IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OKLAHOMA

NOGLE & BLACK AVIATION INCORPORATED, an Illinois corporation,

Plaintiff,

vs.

STEVEN E. SMITH, an individual,
Defendant. and Third-Party Plaintiff

vs.

Charles H. Nogle, an individual,
Third-Party Defendant.

Case No. 98-CV-0899C(E)

JOINT STIPULATION OF DISMISSAL WITH PREJUDICE

Nogle & Black Aviation, Inc., Steven E. Smith, and Charles H. Nogle, being all of the parties who have entered an appearance in this case, jointly agree and stipulate that all causes of action in the above styled case should be dismissed pursuant to Fed. R. Civ. P. 41(a)(1)(ii). It is the express agreement of the parties that this dismissal is with prejudice as to all parties and all causes of action alleged in any pleading filed in this case. Each party herein shall bear their own costs and attorney fees.

Plaintiff:

Nogle & Black Aviation, Inc.

By: Charles H Nogle Pres
Charles H. Nogle, President.

and

01 5

By: _____
Burt Johnson
Bradley Donnell
Looney, Nichols & Johnson
528 N.W. 12th Street
Oklahoma City, Oklahoma 73103
Attorneys for the Plaintiff.

Defendant and Third-Party Plaintiff:

_____
Steven E. Smith, Individually

and

Morrel, West, Saffa, Craige & Hicks, Inc.

By _____
Mark A. Craige, OBA #1992
City Plaza West, 11th Floor
5310 East 31st Street
Tulsa, Oklahoma 74135
(918) 664-0800 Telephone
(918) 663-1383 Facsimile
e-mail: mark@law-office.com
e-mail: jim@law-office.com
Attorneys for Defendant and Third-Party Plaintiff.

Third-Party Defendant:

_____
Charles H. Nogle, Individually.

and

By: _____

Burt Johnson
Bradley Donnell
Looney, Nichols & Johnson
528 N.W. 12th Street
Oklahoma City, Oklahoma 73103
Attorneys for Third-Party Defendant.

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OKLAHOMA

BILL A. CLOSTIO, Plaintiff,	)	
v.	)	Civil No. 99-CV-647-M
KENNETH S. APFEL, Commissioner, Social Security Administration, Defendant.	)	

JUDGMENT

This action has come before the Court for consideration upon an unopposed Motion to Reverse and Remand for Further Administrative Action. An Order reversing and remanding the case to the Commissioner has been entered.

Judgment for Plaintiff and against Defendant is hereby entered pursuant to the Court's Order and in accordance with Fed. R. Civ. P. 58.

THUS DONE AND SIGNED on this 27th day of April 2000.

Frank H. McCarthy
FRANK H. McCARTHY
United States Magistrate Judge

12

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OKLAHOMA

BILL A. CLOSTIO,
Plaintiff,

v.

KENNETH S. APFEL,
Commissioner,
Social Security Administration,
Defendant.

Civil No. 99-CV647-M

ORDER

Upon the unopposed motion of Defendant, Commissioner of the Social Security Administration, by Stephen C. Lewis, United States Attorney of the Northern District of Oklahoma, through Katauna J. King, Special Assistant United States Attorney, it is hereby ORDERED that this case be reversed and remanded to the Commissioner for further administrative action pursuant to sentence four (4) of § 205(g) of the Social Security Act, 42 U.S.C. § 405(g). *Melkonyan v. Sullivan*, 501 U.S. 89 (1991).

THUS DONE AND SIGNED on this 27th day of April 2000.

Frank H. McCarthy
FRANK H. McCARTHY
United States Magistrate Judge

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OKLAHOMA

MICHELLE L. OBENRADER,

Plaintiff,

vs.

BALLY TOTAL FITNESS CORPORATION, a corporation and BOB COE,

Defendants,

and

PEGGY HENDRICKS,

Plaintiff,

vs.

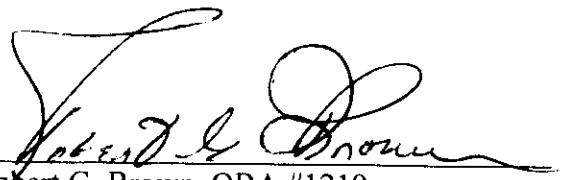
BALLY TOTAL FITNESS CORPORATION, a corporation and BOB COE,

Defendants.

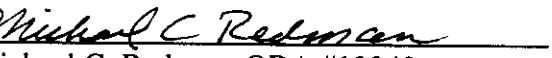
Case No. 98-CV-757-E(E)
(CONSOLIDATED)

DISMISSAL WITH PREJUDICE

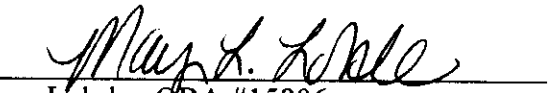
Pursuant to Rule 41(a)(1)(ii), Federal Rules of Civil Procedure, Plaintiffs Michelle Obenrader and Peggy Hendricks, by and through their counsel, Robert Brown, and Defendants Bally Total Fitness Corporation and Bob Coe, by and through their counsel Michael C. Redman and Mary Lohrke, hereby dismiss the above consolidated lawsuit with prejudice.



Robert G. Brown, OBA #1219
Tony L. Waller, OBA #9318
6216 South Lewis, Suite 191
Tulsa, Oklahoma 74136
Attorneys for Plaintiffs
Michelle Obenrader and Peggy Hendricks



Michael C. Redman, OBA #13340
Angela M. Knight, OBA #18089
Doerner, Saunders, Daniel & Anderson, L.L.P.
320 South Boston, Suite 500
Tulsa, OK 74103-7325
(918) 582-1211
Attorneys for Defendant
Bally Total Fitness Corporation



Mary Lohrke, OBA #15806
Boone, Smith, Davis, Hurst & Dickman
100 West Fifth Street, Suite 500
Tulsa, Oklahoma 74103
Attorneys for Defendant Bob Coe

CERTIFICATE OF MAILING

I hereby certify that on the 27th day of April, 2000, I placed the foregoing instrument in the United States Mail with proper postage thereon to the following:

Robert G. Brown
Tony L. Waller
6216 South Lewis, Suite 191
Tulsa, Oklahoma 74136

Michael C. Redman
Angela M. Knight
Doerner, Saunders, Daniel &
Anderson, L.L.P.
320 South Boston, Suite 500
Tulsa, Oklahoma 74103-3725

Mary L. Lohrke

CWK/gc

UNITED STATES DISTRICT COURT FOR THE

NORTHERN DISTRICT OF OKLAHOMA

FILED

APR 27 2000

Phil Lombardi, Clerk
U.S. DISTRICT COURT

SHADOW MOUNTAIN CONDOMINIUMS III HOMEOWNERS' ASSOCIATION, INC.,	
Plaintiff,	
vs	**Case No. 00CV0277K**
UNITED STATES OF AMERICA on behalf of THE SECRETARY OF HOUSING AND URBAN DEVELOPMENT OF WASHINGTON, D.C., His Successors and Assigns,	**Tulsa County District Court Case No. CS-2000-1329**
Defendant.	

ENTERED ON DOCKET

DATE APR 27 2000

NOTICE OF STIPULATION FOR DISMISSAL WITH PREJUDICE

Pursuant to Federal Rules of Civil Procedure 41(a)(1)(ii), it is hereby stipulated by the parties hereto, Shadow Mountain Condominiums III Homeowners' Association, Inc., and The United States of America on behalf of the Secretary of Housing and Urban Development of Washington, D.C., his successors and assigns, by and through their appointed attorneys, that the above entitled action be dismissed, with prejudice, for all claims the Plaintiff may have against the Defendant as of the date of the filing of this Dismissal, each party to be responsible for its own costs and attorney fees incurred herein.

DATED this 26th day of April, 2000.

C15

SHADOW MOUNTAIN CONDOMINIUMS III HOMEOWNERS' ASSOCIATION, INC.

By: _____

Curtis W. Kaiser, OBA #4856
Layon, Cronin & Kaiser, P.L.L.C.
6th Floor, Pratt Tower
125 West 15th Street
Tulsa, Oklahoma 74119
(918) 583-5538

Attorney for Plaintiff

DATED this 27th day of April, 2000.

for _____

Cathryn McClanahan, OBA #14853
Assistant United States Attorney
333 West 4th Street, Suite 3460
Tulsa, Oklahoma 74103-3880
(918) 581-7463

F:\USERS\CWK\SHADOW\HUD30C\Notice Dismissal.fed.wpd

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OKLAHOMA

IN RE:	)	
	)	
COMMERCIAL FINANCIAL SERVICES, INC. AND CF/SPC NGU, INC.,	)	
	)	
Debtor,	)	
	)	
CAROL SPANGLER, JOHN BACHMAN, and BRUCE PHELPS,	)	**Case No. 99-CV-380-H(M)**
	)	
Appellants,	)	Case No. 99-CV-390-H(M)
	)	
v.	)	
	)	
COMMERCIAL FINANCIAL SERVICES,	)	ENTERED ON DOCKET
	)	
Appellee.	)	DATE APR 27 2000

ORDER

This matter comes before the Court on appeal from the United States Bankruptcy Court for the Northern District of Oklahoma. The appeal was referred to a United States Magistrate Judge for report and recommendation. Magistrate Judge McCarthy's Report and Recommendation (Docket # 12) and the Objection To Report and Recommendation of Magistrate of Appellants John Bachman and Bruce Phelps ("Appellants") (Docket # 13) are before the Court. Appellant Carol Spangler ("Spangler") filed no objections to the Report and Recommendation of the Magistrate.

On appeal, Appellants assert that the Bankruptcy Court erred in holding that lump sum termination payments owed them by Appellee CFS were not administrative expense claims under Section 503(b) of the Bankruptcy Code and therefore were not entitled to first priority in distribution under Section 507(a)(1) of the Bankruptcy Code. Appellants primarily argue that

their lump sum termination payments are severance pay claims and are therefore entitled to administrative priority under In Re Amarex, 853 F.2d 1526 (10th Cir. 1988). Appellants further claim that Appellee fraudulently induced them to continue performing under their written employment agreements. In her brief, Appellant Spangler argues only that her severance pay claim is entitled to administrative priority under Amarex.

In his Report and Recommendation, the magistrate judge found that the Bankruptcy Court correctly held that Appellants' lump sum termination payments were not administration expenses under 11 U.S.C. § 503(b)(1)(A), and therefore recommended that this Court affirm the decision of the Bankruptcy Court. The magistrate judge further found that appellants had failed to raise its fraud claims before the Bankruptcy Court, and as a result, recommended that the Court grant Appellee's motion to strike from Appellants' brief the matters not presented to the Bankruptcy Court. Finally, the magistrate judge concluded that Appellants' conduct in raising these issues on appeal was not of a nature to require imposition of sanctions and recommended that this Court deny Appellee's request for sanctions.

In accordance with 28 U.S.C. § 636 and Fed.R.Civ.P. 72(b), the Court has reviewed the Bankruptcy Court's conclusions of law and the magistrate judge's report and recommendation de novo. The Court finds that the Bankruptcy Court correctly held that the lump sum termination payment clauses were not entitled to administrative expense priority under 11 U.S.C. § 503(b)(1)(A), and therefore adopts the report and recommendation of the magistrate judge.

In its opinion, the Bankruptcy Court held that Appellants' post termination lump sum claims could not be characterized as "necessary costs and expenses of preserving the estate"under 11 U.S.C. § 503(b)(1)(A), nor could they be considered compensation for Appellants' post-

petition services. The Bankruptcy Court further rejected Appellants' contention that Tenth Circuit authority dictates that such claims be afforded administrative expense priority. Accordingly, the Bankruptcy Court concluded that because Appellants' claims neither arise from transactions with the debtor-in-possession, nor benefit the debtor-in-possession, they are not entitled to administrative expense priority under 11 U.S.C. § 503(b)(1)(A).

Appellants appeal from the decision of the Bankruptcy Court, asserting that in In re Amarex, 853 F.2d 1526 (10th Cir. 1988), the Tenth Circuit adopted the rationale of all other Courts of Appeals to consider the issue and held that severance pay is correctly classified as an administrative priority expense under 11 U.S.C. § 503(b)(1)(A). Appellants further argue that because CFS permitted them to remain in their pre-petition positions, their claims arose out of a transaction with the debtor-in-possession. Finally, Appellants claim that by continuing to perform their job duties, they provided a benefit to the debtor-in-possession.

Based upon a careful review of the opinion of the Bankruptcy Court, the submissions of the parties, and the relevant case law, the Court finds that the Bankruptcy Court correctly analyzed this issue. The Court rejects Appellants' contention that the Tenth Circuit, in Amarex, held that severance pay is subject to administrative expense priority, or that all other Courts of Appeals to consider the issue have so held. Amarex required the Tenth Circuit to determine the administrative expense classification of a bonus payment, not of severance pay. Therefore, any statement in Amarex regarding the treatment of severance pay under Section 503 is necessarily dicta. Furthermore, the court in Amarex recognized that "there is some disagreement among circuit courts concerning the extent to which severance pay should be accorded priority as an administrative expense." Amarex, 853 F.2d at 1531, n. 5. Finally, the Amarex court explicitly

adopted the analysis utilized by the First Circuit in In re Mammoth Mart, 536 F.2d 950. The Mammoth Mart court rejected as unpersuasive the rationale that Appellants suggest was adopted by the Amarex Court, that severance pay compensation for termination of employment and therefore entitled to administrative expense priority. See 539 F.2d at 955.

Having rejected the notion that Amarex stands for the proposition that severance pay is automatically subject to administrative expense priority, the Court further finds that the Bankruptcy Court correctly applied the Mammoth Mart test adopted by the Amarex court. Under this test, to be entitled to first priority as an administrative expense under 11 U.S.C. § 503(b)(1)(A), a claim must arise from a transaction with the debtor in possession, and the consideration supporting the claim must have been beneficial to the debtor-in-possession. See Amarex, 853 F.2d at 1530 n. 4.

Appellants first argue that because the lump sum termination clauses were part of their employment agreements with the debtor, and because the debtor-in-possession allowed them to remain in their pre-petition positions, their claims arise from a transaction with the debtor-in-possession. The Court finds that the Bankruptcy Court correctly rejected this argument. "It is only when the debtor-in-possession's actions themselves, that is, considered apart form any obligation of the pre-petition debtor, give rise to a legal liability, that the claimant is entitled to the priority of a cost and expense of administration." Mammoth Mart, 539 F.2d at 955. It is clear from the record in this case that the lump sum termination clauses were negotiated with the pre-petition debtor, and not the debtor-in-possession. Accordingly, the Court concludes that Appellants' claims do not arise from a transaction with the debtor-in-possession.

Next, Appellants assert that by remaining in their positions, they conveyed a benefit to the

debtor-in-possession. However, mere conveyance of a benefit does not satisfy the second prong of the Mammoth Mart test. In order for a claim to be entitled to administrative priority, "the consideration supporting the claimant's right to payment [must have been] beneficial to the debtor-in-possession in the operation of the business." Amarex, 853 F.2d at 1530 n. 4. The Bankruptcy Court found that the debtor-in-possession had itself determined that the Appellants' services were not beneficial to the estate by rejecting their pre-petition employment agreements. The Bankruptcy Court further found that Appellants' right to the lump sum termination payments vested immediately upon execution of the employment agreements, and that therefore, their completion of post-petition tasks did not serve as consideration for the lump sum termination payments. Finally, the Bankruptcy Court observed that to the extent that Appellants had performed any post-petition services, they had been fully compensated for those services. The Court finds that the Bankruptcy Court correctly analyzed this issue. To the extent that Appellants provided any benefit to the debtor-in-possession, that benefit (1) did not serve as consideration supporting their claim to the lump sum termination payments, and (2) was fully compensated.

Accordingly, the Court finds that Appellants have failed to satisfy the Mammoth Mart/Amarex requirements for establishing entitlement to administrative expense priority under 11 U.S.C. § 503(b)(1)(A). Furthermore, the Court finds that Appellants failed to raise their fraud claims before the Bankruptcy Court and therefore concludes that Appellee's motion to strike those claims should be granted.

Applying the above analysis to Appellant Spangler's claim, the Court finds that Spangler has also failed to establish either that her claim arises from a transaction with the debtor-in-possession, or that the consideration supporting her claim conveyed a benefit to the debtor-in-

possession, and therefore finds that her claim is not entitled to administrative expense priority under 11 U.S.C. § 503(b)(1)(A).

For the reasons set forth above, the Court concludes that the Magistrate's Report and Recommendation (Docket # 5) should be adopted, and the decision of the Bankruptcy Court is hereby AFFIRMED.

IT IS SO ORDERED.

This 27th day of April, 2000.

Sven Erik Holmes
United States District Judge

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OKLAHOMA

IN RE:	)	
	)	
COMMERCIAL FINANCIAL SERVICES, INC. AND CF/SPC NGU, INC.,	)	
	)	
Debtor,	)	
	)	
CAROL SPANGLER, JOHN BACHMAN, and BRUCE PHELPS,	)	~~Case No. 99-CV-380-H(M)~~
	)	
Appellants,	)	Case No. 99-CV-390-H(M)
	)	
v.	)	
	)	
COMMERCIAL FINANCIAL SERVICES,	)	
	)	
Appellee.	)	

FILED
APR 2[illegible] 2000

ENTERED ON DOCKET
DATE APR 27 2000

ORDER

This matter comes before the Court on appeal from the United States Bankruptcy Court for the Northern District of Oklahoma. The appeal was referred to a United States Magistrate Judge for report and recommendation. Magistrate Judge McCarthy's Report and Recommendation (Docket # 12) and the Objection To Report and Recommendation of Magistrate of Appellants John Bachman and Bruce Phelps ("Appellants") (Docket # 13) are before the Court. Appellant Carol Spangler ("Spangler") filed no objections to the Report and Recommendation of the Magistrate.

On appeal, Appellants assert that the Bankruptcy Court erred in holding that lump sum termination payments owed them by Appellee CFS were not administrative expense claims under Section 503(b) of the Bankruptcy Code and therefore were not entitled to first priority in distribution under Section 507(a)(1) of the Bankruptcy Code. Appellants primarily argue that

14

their lump sum termination payments are severance pay claims and are therefore entitled to administrative priority under In Re Amarex, 853 F.2d 1526 (10th Cir. 1988). Appellants further claim that Appellee fraudulently induced them to continue performing under their written employment agreements. In her brief, Appellant Spangler argues only that her severance pay claim is entitled to administrative priority under Amarex.

In his Report and Recommendation, the magistrate judge found that the Bankruptcy Court correctly held that Appellants' lump sum termination payments were not administration expenses under 11 U.S.C. § 503(b)(1)(A), and therefore recommended that this Court affirm the decision of the Bankruptcy Court. The magistrate judge further found that appellants had failed to raise its fraud claims before the Bankruptcy Court, and as a result, recommended that the Court grant Appellee's motion to strike from Appellants' brief the matters not presented to the Bankruptcy Court. Finally, the magistrate judge concluded that Appellants' conduct in raising these issues on appeal was not of a nature to require imposition of sanctions and recommended that this Court deny Appellee's request for sanctions.

In accordance with 28 U.S.C. § 636 and Fed.R.Civ.P. 72(b), the Court has reviewed the Bankruptcy Court's conclusions of law and the magistrate judge's report and recommendation de novo. The Court finds that the Bankruptcy Court correctly held that the lump sum termination payment clauses were not entitled to administrative expense priority under 11 U.S.C. § 503(b)(1)(A), and therefore adopts the report and recommendation of the magistrate judge.

In its opinion, the Bankruptcy Court held that Appellants' post termination lump sum claims could not be characterized as "necessary costs and expenses of preserving the estate"under 11 U.S.C. § 503(b)(1)(A), nor could they be considered compensation for Appellants' post-

petition services. The Bankruptcy Court further rejected Appellants' contention that Tenth Circuit authority dictates that such claims be afforded administrative expense priority. Accordingly, the Bankruptcy Court concluded that because Appellants' claims neither arise from transactions with the debtor-in-possession, nor benefit the debtor-in-possession, they are not entitled to administrative expense priority under 11 U.S.C. § 503(b)(1)(A).

Appellants appeal from the decision of the Bankruptcy Court, asserting that in In re Amarex, 853 F.2d 1526 (10th Cir. 1988), the Tenth Circuit adopted the rationale of all other Courts of Appeals to consider the issue and held that severance pay is correctly classified as an administrative priority expense under 11 U.S.C. § 503(b)(1)(A). Appellants further argue that because CFS permitted them to remain in their pre-petition positions, their claims arose out of a transaction with the debtor-in-possession. Finally, Appellants claim that by continuing to perform their job duties, they provided a benefit to the debtor-in-possession.

Based upon a careful review of the opinion of the Bankruptcy Court, the submissions of the parties, and the relevant case law, the Court finds that the Bankruptcy Court correctly analyzed this issue. The Court rejects Appellants' contention that the Tenth Circuit, in Amarex, held that severance pay is subject to administrative expense priority, or that all other Courts of Appeals to consider the issue have so held. Amarex required the Tenth Circuit to determine the administrative expense classification of a bonus payment, not of severance pay. Therefore, any statement in Amarex regarding the treatment of severance pay under Section 503 is necessarily dicta. Furthermore, the court in Amarex recognized that "there is some disagreement among circuit courts concerning the extent to which severance pay should be accorded priority as an administrative expense." Amarex, 853 F.2d at 1531, n. 5. Finally, the Amarex court explicitly

adopted the analysis utilized by the First Circuit in In re Mammoth Mart, 536 F.2d 950. The Mammoth Mart court rejected as unpersuasive the rationale that Appellants suggest was adopted by the Amarex Court, that severance pay compensation for termination of employment and therefore entitled to administrative expense priority. See 539 F.2d at 955.

Having rejected the notion that Amarex stands for the proposition that severance pay is automatically subject to administrative expense priority, the Court further finds that the Bankruptcy Court correctly applied the Mammoth Mart test adopted by the Amarex court. Under this test, to be entitled to first priority as an administrative expense under 11 U.S.C. § 503(b)(1)(A), a claim must arise from a transaction with the debtor in possession, and the consideration supporting the claim must have been beneficial to the debtor-in-possession. See Amarex, 853 F.2d at 1530 n. 4.

Appellants first argue that because the lump sum termination clauses were part of their employment agreements with the debtor, and because the debtor-in-possession allowed them to remain in their pre-petition positions, their claims arise from a transaction with the debtor-in-possession. The Court finds that the Bankruptcy Court correctly rejected this argument. "It is only when the debtor-in-possession's actions themselves, that is, considered apart form any obligation of the pre-petition debtor, give rise to a legal liability, that the claimant is entitled to the priority of a cost and expense of administration." Mammoth Mart, 539 F.2d at 955. It is clear from the record in this case that the lump sum termination clauses were negotiated with the pre-petition debtor, and not the debtor-in-possession. Accordingly, the Court concludes that Appellants' claims do not arise from a transaction with the debtor-in-possession.

Next, Appellants assert that by remaining in their positions, they conveyed a benefit to the

debtor-in-possession. However, mere conveyance of a benefit does not satisfy the second prong of the Mammoth Mart test. In order for a claim to be entitled to administrative priority, "the consideration supporting the claimant's right to payment [must have been] beneficial to the debtor-in-possession in the operation of the business." Amarex, 853 F.2d at 1530 n. 4. The Bankruptcy Court found that the debtor-in-possession had itself determined that the Appellants' services were not beneficial to the estate by rejecting their pre-petition employment agreements. The Bankruptcy Court further found that Appellants' right to the lump sum termination payments vested immediately upon execution of the employment agreements, and that therefore, their completion of post-petition tasks did not serve as consideration for the lump sum termination payments. Finally, the Bankruptcy Court observed that to the extent that Appellants had performed any post-petition services, they had been fully compensated for those services. The Court finds that the Bankruptcy Court correctly analyzed this issue. To the extent that Appellants provided any benefit to the debtor-in-possession, that benefit (1) did not serve as consideration supporting their claim to the lump sum termination payments, and (2) was fully compensated.

Accordingly, the Court finds that Appellants have failed to satisfy the Mammoth Mart/Amarex requirements for establishing entitlement to administrative expense priority under 11 U.S.C. § 503(b)(1)(A). Furthermore, the Court finds that Appellants failed to raise their fraud claims before the Bankruptcy Court and therefore concludes that Appellee's motion to strike those claims should be granted.

Applying the above analysis to Appellant Spangler's claim, the Court finds that Spangler has also failed to establish either that her claim arises from a transaction with the debtor-in-possession, or that the consideration supporting her claim conveyed a benefit to the debtor-in-

possession, and therefore finds that her claim is not entitled to administrative expense priority under 11 U.S.C. § 503(b)(1)(A).

For the reasons set forth above, the Court concludes that the Magistrate's Report and Recommendation (Docket # 12) should be adopted, and the decision of the Bankruptcy Court is hereby AFFIRMED.

IT IS SO ORDERED.

This 26th day of April, 2000.

Sven Erik Holmes
United States District Judge

UNITED STATES DISTRICT COURT FOR THE
NORTHERN DISTRICT OF OKLAHOMA

UNITED STATES OF AMERICA, on behalf of the Secretary of Veterans Affairs, Plaintiff, v. BASEL LYNN DRANE; BERTIE DECKER DRANE; COUNTY TREASURER, Ottawa County, Oklahoma; BOARD OF COUNTY COMMISSIONERS, Ottawa County, Oklahoma, Defendants.	)	CIVIL ACTION NO. 99-CV-0734-B (J)

FILED
APR 27 2000
Phil Lombardi, Clerk
U.S. DISTRICT COURT

ENTERED ON DOCKET
DATE APR 27 2000

JUDGMENT OF FORECLOSURE

This matter comes on for consideration this 26th day of Apr., 2000. The Plaintiff appears by Stephen C. Lewis, United States Attorney for the Northern District of Oklahoma, through Loretta F. Radford, Assistant United States Attorney; the Defendants, County Treasurer, Ottawa County, Oklahoma, and Board of County Commissioners, Ottawa County, Oklahoma, appear by Fred H. Demier, Assistant District Attorney, Ottawa County, Oklahoma; that the Defendants, Basel Lynn Drane and Bertie Decker Drane, appear not, but make default.

The Court being fully advised and having examined the court file finds that the Defendant, Basel Lynn Drane, was served with Summons and Complaint by a United States Deputy Marshal on November 23, 1999; that the Defendant, Bertie Decker Drane, was served with Summons and Complaint by certified mail, return receipt requested, delivery restricted to the addressee on September 2, 1999.

8

It appears that the Defendants, County Treasurer, Ottawa County, Oklahoma, and Board of County Commissioners, Ottawa County, Oklahoma, filed their Answer on April 13, 2000; and that the Defendants, Basel Lynn Drane and Bertie Decker Drane, have failed to answer and their default has therefore been entered by the Clerk of this Court.

The Court further finds that this is a suit based upon a certain mortgage note and for foreclosure of a mortgage upon the following described real property located in Ottawa County, Oklahoma, within the Northern Judicial District of Oklahoma:

> Lot 20 and the N½ of Lot 21 in Block 79 Second Addition to Commerce, Ottawa County, Oklahoma, according to the recorded plat thereof.

The Court further finds that on May 23, 1996, the Defendants, Basel Lynn Drane and Bertie Decker Drane, executed and delivered to Inland Mortgage Corporation their mortgage note in the amount of $42,700.00, payable in monthly installments, with interest thereon at the rate of 8.0 percent per annum.

The Court further finds that as security for the payment of the above-described note, the Defendants, Basel Lynn Drane and Bertie Decker Drane, husband and wife, executed and delivered to Inland Mortgage Corporation, a real estate mortgage dated May 23, 1996, covering the above-described property, situated in the State of Oklahoma, Ottawa County. This mortgage was recorded on May 24, 1996, in Book 0593, Page 570, in the records of Ottawa County, Oklahoma.

The Court further finds that on May 22, 1998, Irwin Mortgage Corporation aka Inland Mortgage Corporation assigned the above-described mortgage note and

mortgage to the Secretary of Veterans Affairs. This Assignment of Real Estate Mortgage was recorded on June 22, 1998, in Book 0627, Page 392, in the records of Ottawa County, Oklahoma. The Secretary of Veterans Affairs reamortized this loan with the interest rate changing to 7.0 percent per annum.

The Court further finds that the Defendants, Basel Lynn Drane and Bertie Decker Drane, made default under the terms of the aforesaid note and mortgage by reason of their failure to make the monthly installments due thereon, which default has continued, and that by reason thereof Plaintiff alleges that there is now due and owing under the note and mortgage, after full credit for all payments made, the principal sum of $44,386.25, plus administrative charges in the amount of $431.00, plus penalty charges in the amount of $31.60, plus accrued interest in the amount of $3,501.25 as of March 9, 1999, plus interest accruing thereafter at the rate of 7.0 percent per annum, plus interest thereafter at the legal rate until fully paid, and the costs of this action in the amount of $8.00 (fee for recording Notice of Lis Pendens).

The Court further finds that the Defendants, County Treasurer and Board of County Commissioners, Ottawa County, Oklahoma, claim no right, title or interest in the subject real property.

The Court further finds that the Defendants, Basel Lynn Drane and Bertie Decker Drane, are in default and therefore have no right, title or interest in the subject real property.

IT IS THEREFORE ORDERED, ADJUDGED, AND DECREED that the Plaintiff, the United States of America, acting on behalf of the Secretary of Veterans

Affairs, have and recover judgment in rem against Defendants, Basel Lynn Drane and Bertie Decker Drane, in the principal sum of $44,386.25, plus administrative charges in the amount of $431.00, plus penalty charges in the amount of $31.60, plus accrued interest in the amount of $3,501.25 as of March 9, 1999, plus interest accruing thereafter at the rate of 7.0 percent per annum, plus interest thereafter at the current legal rate of 6.197 percent per annum until fully paid, plus the costs of this action in the amount of $8.00 (fee for recording Notice of Lis Pendens), plus any additional sums advanced or to be advanced or expended during this foreclosure action by Plaintiff for taxes, insurance, abstracting, or sums for the preservation of the subject property, plus any other advances.

IT IS FURTHER ORDERED, ADJUDGED, AND DECREED that the Defendants, Basel Lynn Drane; Bertie Decker Drane; County Treasurer, Ottawa County, Oklahoma; and Board of County Commissioners, Ottawa County, Oklahoma, have no right, title, or interest in the subject real property.

IT IS FURTHER ORDERED, ADJUDGED, AND DECREED that an Order of Sale shall be issued to the United States Marshal for the Northern District of Oklahoma, commanding him to advertise and sell according to Plaintiff's election with or without appraisement the real property involved herein and apply the proceeds of the sale as follows:

First:
In payment of the costs of this action accrued and accruing incurred by the Plaintiff, including the costs of sale of said real property;

Second:
In payment of the judgment rendered herein in favor of the Plaintiff.

The surplus from said sale, if any, shall be deposited with the Clerk of the Court to await further Order of the Court.

IT IS FURTHER ORDERED, ADJUDGED, AND DECREED that from and after the sale of the above-described real property, under and by virtue of this judgment and decree, all of the Defendants and all persons claiming under them since the filing of the Complaint, be and they are forever barred and foreclosed of any right, title, interest or claim in or to the subject real property or any part thereof.

UNITED STATES DISTRICT JUDGE

APPROVED:

STEPHEN C. LEWIS
United States Attorney

LORETTA F. RADFORD, OBA #11158
Assistant United States Attorney
333 West 4th Street, Suite 3460
Tulsa, Oklahoma 74103
(918) 581-7463

FRED H. DEMIER, OBA #2208
Assistant District Attorney
Ottawa County Courthouse
Miami, OK 74354
(918) 542-5547
Attorney for Defendants,
County Treasurer and Board of County Commissioners,
Ottawa County, Oklahoma

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OKLAHOMA

JOHN WREN MULLENAX,)
)
Petitioner,)
)
vs.) No. 98-CV-893 B (E)
)
STEVEN KAISER, Warden,)
)
Respondent.)

JUDGMENT

This matter came before the Court upon Petitioner's 28 U.S.C. § 2254 petition for writ of habeas corpus. The Court duly considered the issues and rendered a decision herein.

IT IS THEREFORE ORDERED, ADJUDGED, AND DECREED that judgment is hereby entered for Respondent and against Petitioner.

SO ORDERED THIS 26th day of April, 2000.

THOMAS R. BRETT, Senior Judge
UNITED STATES DISTRICT COURT

10

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OKLAHOMA

JOHN WREN MULLENAX,)
)
Petitioner,)
)
vs.) No. 98-CV-893 B (E)
)
STEVEN KAISER, Warden,)
)
Respondent.)

ORDER

Before the Court for consideration is the petition for a writ of habeas corpus filed by Petitioner, a state inmate appearing *pro se*. Respondent has filed a response pursuant to Rule 5, *Rules Governing Section 2254 Cases* (Docket #5). Petitioner has not filed a reply despite having been provided a second opportunity pursuant to the Court's Order entered March 4, 1999 (#7). Therefore, the Court has evaluated the issue raised in the petition based on information contained in the petition and the response thereto. For the reasons discussed below, the Court finds the petition should be denied.

BACKGROUND

Petitioner attacks his conviction entered in Tulsa County District Court, Case No. CF-96-2663. At a stipulated non-jury trial, the trial judge found Petitioner guilty of Possession of a Firearm, After Former Conviction of a Felony. Petitioner was sentenced to ten (10) years imprisonment.

Petitioner appealed his conviction to the Oklahoma Court of Criminal Appeals ("OCCA"). On direct appeal, Petitioner raised one proposition of error: that the trial court committed reversible

9

error by overruling his motion to suppress because the tip obtained from an unknown informant did not provide sufficiently reliable information to justify the stop on grounds of reasonable suspicion. (#5, Ex. D). On November 21, 1997, the OCCA entered its unpublished summary opinion affirming Petitioner's conviction and sentence. (#5, Ex. A).

Petitioner filed the instant petition for writ of habeas corpus on November 24, 1998. He raises one ground of error, the same ground of error presented to the OCCA on direct appeal. In response, Respondent argues that under 28 U.S.C. § 2254(d), Petitioner is not entitled to habeas corpus relief.

ANALYSIS

The Court need not belabor its discussion of Petitioner's application for a writ of habeas corpus because the state courts granted Petitioner a full and fair opportunity to litigate his claim premised on the Fourth Amendment. In Stone v. Powell, 428 U.S. 465, 494 (1976), the Supreme Court stated that where the state has provided an opportunity for full and fair litigation of a Fourth Amendment claim, a state prisoner may not be granted federal habeas corpus relief on the ground that evidence obtained in an unconstitutional search and seizure was introduced at trial. The Tenth Circuit has reiterated that a federal habeas corpus court need not address a Fourth Amendment question as long as the state court has given the petitioner a full and fair opportunity for a hearing on the issue. Miranda v. Cooper, 967 F.2d 392, 400-01 (10th Cir. 1992).

In this case, Petitioner received several opportunities in the state courts to fully, fairly, and adequately discuss the admissibility of the evidence in question. Petitioner moved to quash his arrest and subsequent search at the preliminary hearing held in the trial court on July 25, 1996. (#5, Ex. B, Trans. of Preliminary Hearing at 12-13). His arguments were heard and overruled. (Id.)

Petitioner reurged his motion to quash the arrest and subsequent search at the October 7, 1996, non-jury trial. (#5, Ex. C, Trans. at 4-7). Again, his arguments were heard and overruled. (Id.) Lastly, Petitioner raised this issue in his direct criminal appeal where the Oklahoma Court of Criminal Appeals affirmed his conviction, holding that the arresting police officer "had sufficient facts to warrant a man of reasonable caution in the belief that the action taken was appropriate. *Terry v. Ohio*, 392 U.S. 1, 21-22, 88 S.Ct. 1868, 1880, 20 L.Ed.2d 889 (1968)." (#5, Ex. A).

Therefore, based on the record, the Court concludes that Petitioner had a full and fair opportunity to litigate his Fourth Amendment claim in the state courts. As a result, this Court is precluded from considering the issue raised in Petitioner's application for a writ of habeas corpus based on Stone v. Powell, 428 U.S. 465, 494 (1976). See also Davis v. Blackburn, 803 F.2d 1371, 1372 (5th Cir.1986) (*per curiam*) (federal habeas courts should dismiss Fourth Amendment claim *sua sponte* when petitioner had the opportunity to fully litigate claim in state system).

ACCORDINGLY, IT IS HEREBY ORDERED that the petition for a writ of habeas corpus is **denied**.

SO ORDERED this 26th day of July, 2000.

THOMAS R. BRETT, Senior Judge
UNITED STATES DISTRICT COURT

UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF OKLAHOMA

CHRIS V. KEMENDO,

Plaintiff(s),

vs.

OMNIMARK, LTD., WILLIAM BLACKWELL, and GARRETT KRAUSE,

Defendant(s).

Case No. 99-CV-808-B(J)

REPORT AND RECOMMENDATION

On this 25th day of April 2000, Plaintiff's Motion for Sanctions [Doc. No. 18-1], and Plaintiff's Motion for Default Judgment [Doc. No. 18-2] are heard by the Court. James R. Gotwals and Kelly S. Bishop appear on behalf of the Plaintiff. Robert J. Petrick appears on behalf of the Defendant. Defendants Blackwell and Krause are each ordered to file supplemental responses to Plaintiff's discovery requests. The Magistrate Judge recommends that if the Defendants do not file appropriate responses, the District Court **grant** Plaintiff's motion and enter judgment against the Defendants.

On March 3, 2000, Plaintiff filed a Motion to Compel responses from Defendants William Blackwell and Garrett Krause. Defendants acknowledged that no response to Plaintiff's discovery had been provided to Plaintiff. The Court sustained Plaintiff's motion, and Defendant Krause was ordered to file a response to the discovery requests by March 24, 2000. Defendant Blackwell was ordered to respond

22

to the discovery by March 30, 2000. The Court additionally imposed sanctions against Plaintiff in the amount of $400.

On April 7, 2000, Plaintiff filed a motion for sanctions and for default judgment against the Defendants. Plaintiff allege that Defendants have not fully complied with the Court's prior order, and Plaintiff requests the entry of sanctions or default judgment.

With regard to Defendant Blackwell, Plaintiff asserts that the responses were untimely, that the responses lack the proper form of acknowledgment, and that several "responses" were unresponsive. The Court orders Defendant to submit a supplemental response to Plaintiff within 24 hours.

With regard to Defendant Krause, Plaintiff notes that numerous answers are incomplete, unresponsive, or improper. Defendant is directed to file a full and complete response to all discovery requests by May 9, 2000. Defendant's response should be in full compliance with applicable federal and local rules. The Court notes that this is the second time that Defendant has been ordered to respond to Plaintiff's discovery requests. If Defendant does not fully and completely respond by May 9, 2000, Plaintiff should file a motion for default judgment or dismissal pursuant to Fed. R. Civ. P. 37. Upon the filing and review of Plaintiff's motion, the Magistrate Judge will recommend to the District Court that judgment be entered in favor of Plaintiff and against Defendant Krause.

OBJECTIONS

The District Judge assigned to this case will conduct a *de novo* review of the record and determine whether to adopt or revise this Report and Recommendation or whether to recommit the matter to the undersigned. As part of his/her review of the record, the District Judge will consider the parties' written objections to this Report and Recommendation. A party wishing to file objections to this Report and Recommendation must do so within ten days after being served with a copy of this Report and Recommendation. See 28 U.S.C. § 636(b)(1) and Fed. R. Civ. P. 72(b). The failure to file written objections to this Report and Recommendation may bar the party failing to object from appealing any of the factual or legal findings in this Report and Recommendation that are accepted or adopted by the District Court. See Moore v. United States, 950 F.2d 656 (10th Cir. 1991); and Talley v. Hesse, 91 F.3d 1411, 1412-13 (10th Cir. 1996).

Dated this 25 day of April 2000.

Sam A. Joyner
United States Magistrate Judge

CERTIFICATE OF SERVICE

The undersigned certifies that a true copy of the foregoing pleading was served on each of the parties hereto by mailing the same to them or to their attorneys of record on the 27 Day of April 2000.

UNITED STATES DISTRICT COURT FOR THE
NORTHERN DISTRICT OF OKLAHOMA

UNITED STATES OF AMERICA)
Plaintiff,)
)
v.) CIVIL NO. 99CV0856BU(M)
)
JAMES D. RANKIN,)
Defendant.)

JUDGMENT

This matter came before the Court on Plaintiff's Motion for Summary Judgment. The Court duly considered the issues and rendered a decision in accordance with the order filed on April 19, 2000.

IT IS THEREFORE ORDERED, ADJUDGED AND DECREED that judgment is hereby entered for Plaintiff and against Defendant in the principal amount of $22,973.00, accrued interest in the amount of $18,922.99 as of August 27, 1999, plus accrued interest at the rate of 5.66% per annum until judgment, filing fees in the amount of $150.00, plus interest thereafter at the legal rate of 6.197 until paid.

IT IS FURTHER ORDERED, ADJUDGED AND DECREED that Plaintiff's Motion to Dismiss Defendant's Counterclaim is GRANTED, Plaintiff's Motion for Summary

Judgment is GRANTED, and Defendant's Motion for Summary Judgment is DENIED.

IT IS SO ORDERED.

This 26 day of April, 2000.

MICHAEL BURRAGE
United States District Judge

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OKLAHOMA

DELMER B. GARRETT, DELMER GENE GARRETT, and RUTH GARRETT'S ESTATE,	)	ENTERED ON DOCKET
	)	DATE APR 27 2000
Plaintiffs,	)	
v.	)	**Case No. 99-CV-510-K (M)**
	)	F I L E D
JOHN LANNING, Judge; TEC; MIKE ALLEN; GARY MADDUX, Attorney; and T.E.C. THERMAL ENERGY CORP.,	)	APR 26 2000
	)	Phil Lombardi, Clerk
Defendants.	)	U.S. DISTRICT COURT

ORDER

Before the Court is the motion to dismiss of Defendants Mike Allen, Gary Maddux, and Peter Knollenberg (referred to as "Rolenberg" in Plaintiffs' complaint). These defendants argue that the Court should dismiss Plaintiffs' claims against them for lack of subject matter jurisdiction, lack of personal jurisdiction, and failure to state a claim upon which relief could be granted. *See* Fed. R. Civ. P. 12(b)(1), (2), (6).

History of Case

Plaintiffs filed suit on June 29, 1999, alleging that Judge John Lanning violated the Civil Rights Act by granting a restraining order to Thermal Energy Corporation ("TEC") in an effort to use his power to intimidate and further a personal vendetta against the Garrett family. The complaint further asks for $ 1 million in compensation from TEC for conversion of minerals. Plaintiffs also attempt to state causes of action against (1) Mike Allen, as an

14

employee of TEC who knew all the details of the lease; (2) Gary Maddux, as an employee of TEC who allegedly drew up a verbal agreement between Ruth Garrett, the Garrett estate, and TEC; and (3) Peter Rolenberg, as the owner of TEC. The Court granted Judge John Lanning's motion to dismiss on October 8, 1999.

Applicable Law

A court may dismiss a complaint for failure to state a claim only if it is clear that the plaintiff can prove no set of facts in support of his claim entitling him to relief. *See Conley v. Gibson*, 355 U.S. 41, 45-46 (1957); *Calderon v. Kansas Dep't of Social & Rehabilitation Servs.*, 181 F.3d 1180, 1183 (10th Cir. 1999). For purposes of making this determination, a court must accept the well-pleaded allegations of the complaint as true and construe them in the light most favorable to the plaintiff. *See Realmonte v. Reeves*, 169 F.3d 1280, 1283 (10th Cir. 1999). As granting a motion to dismiss is a harsh remedy, it must be cautiously studied, both to effectuate the spirit of the liberal rules of pleading and to protect the interests of justice. *See Cottrell, Inc. v. Biotrol Int'l, Inc.*, 191 F.3d 1248, 1251 (10th Cir. 1999). Furthermore, the Court liberally construes *pro se* complaints. *See Haines v. Kerner*, 404 U.S. 519, 520 (1972) (per curiam).

Discussion

Plaintiffs have not alleged a 42 U.S.C. § 1983 claim against the remaining defendants. To state a claim under section 1983, a plaintiff must allege the violation of a right secured by the Constitution and laws of the United States and must show that the alleged deprivation

was committed by a person acting under color of state law. *See West v. Atkins*, 487 U.S. 42, 48 (1988). To act under color of state law, a person must have exercised power possessed by virtue of state law and made possible only because he was clothed with the authority of state law. *See id.* at 49. Acts that constitute state action under the 14th Amendment also satisfy this requirement. *See id.* In order to constitute state action, the alleged deprivation must have been committed by a state actor. Plaintiffs have not alleged that any of the remaining defendants, including those not involved in the bringing of this motion, in any way acted under color of state law or were state actors.[1] Plaintiffs further do not allege that these defendants committed any civil rights violations. The most liberal reading of Plaintiffs' complaint is that they are suing TEC for conversion and obtaining an injunction against them and the remaining defendants for being employed by TEC, negotiating for TEC, or knowing about TEC's lease.

Because Plaintiffs have entirely failed to state a claim under 42 U.S.C. § 1983 or any federal law[2] and because there is not complete diversity between the parties, the Court lacks subject matter jurisdiction over Plaintiffs' remaining claims. The Court does not have federal-question jurisdiction over this matter, because it does not arise under the Constitution, laws, or treaties of the United States. *See* 28 U.S.C. § 1331. In order for the Court to have

---

[1]Although Judge John Lanning, as an Oklahoma state judge, may have acted under color of state law, Plaintiffs do not allege any conspiracy between him and the other defendants.

[2]In their response to the motion to dismiss, Plaintiffs cite to a federal criminal statute prohibiting the interstate transportation of stolen goods, 18 U.S.C. § 2314. This is insufficient to state a civil action under federal law.

diversity jurisdiction, there must be complete diversity, that is, no defendant can be a citizen of the same state as any plaintiff. *See Owen Equip. & Erection Co. v. Kroger*, 437 U.S. 365, 373 (1978). In this case, Plaintiff Delmer B. Garrett and Defendants Allen, Maddux, and Knollenberg are all citizens of Oklahoma. Therefore, the Court lacks jurisdiction to hear Plaintiffs claims for conversion and other state law claims against Defendants.

The Court finds that Plaintiffs have, for the same reasons stated above, failed to state a federal law claim against Defendants TEC and T.E.C. Thermal Energy Corp. Furthermore, the Court's lack of subject matter jurisdiction extends to the state law claims against these defendants, as well. The Court, therefore, finds that dismissal of Plaintiffs' claims against all remaining defendants is appropriate.

IT IS THEREFORE ORDERED that the Motion to Dismiss Defendants Mike Allen, Gary Maddux, and Peter Knollenberg, Misnamed as "Peter Rolenberg" (# 10) is GRANTED and the above-captioned case is DISMISSED in its entirety.

ORDERED this 26 day of APRIL, 2000.

TERRY C. KERN, CHIEF
UNITED STATES DISTRICT JUDGE

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OKLAHOMA

DWAYNE GARRETT,	)	ENTERED ON DOCKET
	)	DATE APR 27 2000
Plaintiff,	)	
	)	
v.	)	**Case No. 00-CV-225-K (E)**
	)	
JOE L. WHITE, JOHN LANNING, RICK ESSER, DYNDA POST, STATE OF OKLAHOMA, and JANET RENO,	)	**FILED**
	)	APR 26 2000
	)	Phil Lombardi, Clerk U.S. DISTRICT COURT
Defendants.	)	

ORDER

Before the Court is Defendant Rick Esser's motion to dismiss Plaintiff's complaint for lack of subject matter jurisdiction and failure to state a claim upon which relief may be granted. *See* Fed. R. Civ. P. 12(b)(1), (6).

History of Case

Plaintiff has filed suit against the above defendants based on events surrounding his bankruptcy, the issuance of sanctions against him in a civil case, and the filing of criminal charges against him. Plaintiff alleges that Joe L. White failed to comply with bankruptcy rules and then conspired with Judge Lanning, Rick Esser, and the State of Oklahoma to be a victim so they could charge Plaintiff with forgery. Plaintiff attaches to his complaint an order by Judge Lanning imposing sanctions on Plaintiff for violating his orders in a civil action between Plaintiff and Carlotta Colene Garrett, who was represented by Joe White. Plaintiff also alleges that Judge Dynda Post violated his constitutional rights by issuing a

bench warrant for his arrest without following certain procedures and that she conspired with Lisa Breshear to violate his civil rights in this manner. Plaintiff asks this Court to recuse Judge Post from his criminal case in the Oklahoma state court. Throughout his complaint, Plaintiff also makes reference to various unidentifiable statutes and federal criminal law. Although the caption to Plaintiff's complaint includes Janet Reno, his complaint contains no allegations against her.

Applicable Law

A court may dismiss a complaint for failure to state a claim only if it is clear that the plaintiff can prove no set of facts in support of his claim entitling him to relief. *See Conley v. Gibson*, 355 U.S. 41, 45-46 (1957); *Calderon v. Kansas Dep't of Social & Rehabilitation Servs.*, 181 F.3d 1180, 1183 (10th Cir. 1999). For purposes of making this determination, a court must accept the well-pleaded allegations of the complaint as true and construe them in the light most favorable to the plaintiff. *See Realmonte v. Reeves*, 169 F.3d 1280, 1283 (10th Cir. 1999). As granting a motion to dismiss is a harsh remedy, it must be cautiously studied, both to effectuate the spirit of the liberal rules of pleading and to protect the interests of justice. *See Cottrell, Inc. v. Biotrol Int'l, Inc.*, 191 F.3d 1248, 1251 (10th Cir. 1999). Furthermore, the Court liberally construes *pro se* complaints. *See Haines v. Kerner*, 404 U.S. 519, 520 (1972) (per curiam).

Discussion

Rick Esser

Plaintiff has failed to state a claim for which relief could be granted against Defendant Rick Esser. As Plaintiff cannot sue based on the cited criminal statutes, the Court interprets his *pro se* complaint as attempting to state a claim under 42 U.S.C. § 1983, which provides a civil action for the deprivation of rights. An allegation of conspiracy can form the basis of a section 1983 claim. *See Tonkovich v. Kansas Bd. of Regents*, 159 F.3d 504, 533 (10th Cir. 1998). However, Plaintiff must allege specific facts showing an agreement and concerted action amongst the defendants, and conclusory allegations of conspiracy are insufficient to state a valid claim. *See id.* Plaintiff's allegations are merely conclusory. He makes no allegation that Defendants even conversed or otherwise acted in such as way as to indicate an agreement between them. He does not allege that Defendant Esser took any action whatsoever against him other than the following: "He [Joe White] conspired with Rick Esser so they could conclude the statute of forgery, of which I am not guilty. . . . This is a conspiracy with Rick Esser, John Lanning to try to make their statute, which is forgery." This is simply insufficient to state a claim under section 1983.

To the extent that Plaintiff alleges that Mr. Esser violated his civil rights by bringing criminal charges against him as District Attorney for Washington and Nowata Counties, his claims are barred by prosecutorial immunity. A prosecutor is absolutely immune for activities intimately associated with the judicial process, such as initiating and pursuing a

criminal prosecution, although this immunity does not extend to his administrative or investigative functions. *See Snell v. Tunnell*, 920 F.2d 673, 686 (10th Cir. 1990).

John Lanning and Dynda Post

The Court finds, *sua sponte*, that the dismissal of Judges Lanning and Post is appropriate, because Plaintiff's complaint alleges that they violated his constitutional rights through their official actions. Plaintiff bases his allegations against Judge Lanning on a order sanctioning him in a civil case and his allegations against Judge Post on her issuance of a bench warrant. These claims are barred by absolute judicial immunity. A judge acting in his judicial capacity is absolutely immune from civil rights suits unless he acts clearly without any colorable claim of jurisdiction. *See Snell v. Tunnell*, 920 F.2d 673, 686 (10th Cir. 1990). The Court determines whether a judge performed a judicial act or acted in the clear absence of jurisdiction by looking at the nature of the act itself, that is, whether it is a function a judge normally performs. *See Hunt v. Bennett*, 17 F.3d 1263, 1266 (10th Cir. 1994). The Court also looks at the expectation of the parties and whether they dealt with the judge in his judicial capacity. *See id.* Plaintiff has not alleged that Judge Lanning lacked any colorable claim of jurisdiction over the civil case cited, nor has he alleged that Judge Post lacked jurisdiction over his criminal case. Plaintiff's allegations against Judges Lanning and Post are thus barred.[1]

[1]To the extent that Plaintiff's complaint might liberally be construed as attempting to assert a claim against Judge Lanning for conspiracy to violate his civil rights based on non-judicial actions, the Court finds that Plaintiff has failed to allege any facts showing an agreement between Judge Lanning and others or any

Janet Reno

Plaintiff's complaint makes absolutely no mention of Janet Reno. Therefore, the Court finds that he has failed to state a claim upon which relief could be granted against Janet Reno.

Joe L. White

Plaintiff has failed to state a section 1983 claim against Joe L. White, as well. To state a claim under section 1983, a plaintiff must allege the violation of a right secured by the Constitution and laws of the United States and must show that the alleged deprivation was committed by a person acting under color of state law. *See West v. Atkins*, 487 U.S. 42, 48 (1988). To act under color of state law, a person must have exercised power possessed by virtue of state law and made possible only because he was clothed with the authority of state law. *See id.* at 49. Acts that constitute state action under the 14th Amendment also satisfy this requirement. *See id.* In order to constitute state action, the alleged deprivation must have been committed by a state actor. Plaintiff has not alleged that Joe White in any way acted under color of state law or was a state actor. Rather, Plaintiff alleges that Joe White represented an adversary party in a civil action in which Plaintiff was sanctioned, was a debtor in Plaintiff's bankruptcy case, and was a "victim" in the criminal charges brought against Plaintiff. Furthermore, Plaintiff has not alleged a conspiracy under section 1983, because he has not alleged any facts indicating an agreement between Defendant White and

---

concerted action based on that agreement.

any other person or concerted action by these parties.

Conclusion

The Court grants Rick Esser's motion to dismiss for failure to state a claim. The Court, *sua sponte*, dismisses the remaining defendants, Joe L. White, John Lanning, Dynda Post, and Janet Reno for failure to state a claim, as well.

IT IS THEREFORE ORDERED that the Defendant Rick Esser's Motion to Dismiss (# 5) is GRANTED and Plaintiff's claims against Joe L. White, John Lanning, Rick Esser, Dynda Post, and Janet Reno are DISMISSED.

ORDERED this 26 day of APRIL, 2000.

TERRY C. KERN, CHIEF
UNITED STATES DISTRICT JUDGE

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OKLAHOMA

DELMER B. GARRETT,	)	
	)	
Plaintiff,	)	
	)	
v.	)	**Case No. 00-CV-138-K (E)**
	)	
KAREN WALSH and JAN DRIELING,	)	
	)	
Defendant.	)	

ORDER

Before the Court is the motion to dismiss of Defendant Judge Jan Dreiling (sued as "Drieling"). Judge Dreiling argues that Plaintiff's complaint should be dismissed for failure to comply with Fed. R. Civ. P. 8, failure to state a cause of action under any federal law, and absolute judicial immunity.[1]

History of Case

This is one of many suits filed by Plaintiff, his son, and his wife's estate against judges, district attorneys, witnesses, and other persons involved in state and federal court proceedings surrounding the Garretts. In this case, Plaintiff is attempting to sue the judge presiding over the probate proceedings for his spouse's estate and the court-appointed trustee in his son's bankruptcy proceedings – Jan Dreiling and Karen Walsh, respectively. Jan Dreiling is an Associate District Judge of the Washington County District Court. Plaintiff's amended complaint alleges that Judge Dreiling and Ms. Walsh conspired to cloud title on

[1]Although Plaintiff filed an amended complaint subsequent to Judge Dreiling's motion to dismiss, the Court finds that her arguments are equally applicable to the allegations in the amended complaint.

10

Plaintiff's homestead in violation of the 14th amendment, 42 U.S.C. §§ 1985, 1986, 18 U.S.C. § 242, and various other indiscernible statutes. Plaintiff alleges that the motivation behind this conspiracy was a grand jury investigation against Judge Dreiling. Karen Walsh is the court-appointed trustee in Dwayne Garrett's Chapter 7 bankruptcy in the United States Bankruptcy Court for the Northern District of Oklahoma, Case No. 98-03563-R. Plaintiff sues Walsh apparently for filing a First Amended Complaint to recover a fraudulent conveyance in *Walsh, Trustee v. Garrett, et. al.*, Case No. 98-0338-R. Plaintiff argues that this suit violates the statute limitations and is a frivolous lawsuit attempting to cloud title on his property and save Judge Dreiling from prosecution.

Applicable Law

A court may dismiss a complaint for failure to state a claim only if it is clear that the plaintiff can prove no set of facts in support of his claim entitling him to relief. *See Conley v. Gibson*, 355 U.S. 41, 45-46 (1957); *Calderon v. Kansas Dep't of Social & Rehabilitation Servs.*, 181 F.3d 1180, 1183 (10th Cir. 1999). For purposes of making this determination, a court must accept the well-pleaded allegations of the complaint as true and construe them in the light most favorable to the plaintiff. *See Realmonte v. Reeves*, 169 F.3d 1280, 1283 (10th Cir. 1999). As granting a motion to dismiss is a harsh remedy, it must be cautiously studied, both to effectuate the spirit of the liberal rules of pleading and to protect the interests of justice. *See Cottrell, Inc. v. Biotrol Int'l, Inc.*, 191 F.3d 1248, 1251 (10th Cir. 1999). Furthermore, the Court liberally construes *pro se* complaints. *See Haines v. Kerner*, 404 U.S.

519, 520 (1972) (per curiam).

Discussion

Plaintiff has failed to state, against Judge Dreiling, any claim for which she is not absolutely immune. Plaintiff's complaint contains vague allegations that Judge Dreiling somehow conspired with Ms. Walsh to file the fraudulent transfer proceedings, because she "was under a grand jury investigation and needed a way out to old [sic] the property." Liberally construing Plaintiff's amended complaint, the Court finds that it does not state any claim, except perhaps one based on Judge Dreiling's actions as a probate judge. That is, Plaintiff appears to complain that Judge Dreiling is using the bankruptcy proceedings in order to refuse to clear title on some property that Plaintiff claims.

Plaintiff has not stated a claim of conspiracy under 42 U.S.C. § 1985 or neglect to prevent such conspiracy under section 1986. An allegation under section 1985(3) must include class-based or racially discriminatory animus. *See Bisbee v. Bey*, 39 F.3d 1096, 1102 (10th Cir. 1994). Plaintiff has not made any allegations that Judge Dreiling and Ms. Walsh conspired to deprive him of his civil rights based on his race or class.

Plaintiff has also failed to state a claim of conspiracy under 42 U.S.C. § 1983. Although Plaintiff does not mention this statute in his pleading, the Court will interpret his complaint as attempting to state a civil rights claim under this section. An allegation of conspiracy can form the basis of a section 1983 claim. *See Tonkovich v. Kansas Bd. of Regents*, 159 F.3d 504, 533 (10th Cir. 1998). However, Plaintiff must allege specific facts

showing an agreement and concerted action amongst the Defendants, and conclusory allegations of conspiracy are insufficient to state a valid claim. *See id.* Plaintiff has made no more than conclusory allegations of conspiracy. He makes no allegation that the Defendants even know each other, much less conversed or otherwise acted in such a way as to indicate an agreement between them. The only facts supporting his claim is that Judge Dreiling would somehow benefit from Ms. Wright's actions. This is simply insufficient to state a claim under section 1983.

Plaintiff's allegations based on Judge Dreiling's actions as a probate judge are barred by absolute judicial immunity. A judge acting in her judicial capacity is absolutely immune from civil rights suits unless she acts clearly without any colorable claim of jurisdiction. *See Snell v. Tunnell*, 920 F.2d 673, 686 (10th Cir. 1990). The Court determines whether a judge performed a judicial act or acted in the clear absence of jurisdiction by looking at the nature of the act itself, that is, whether it is a function a judge normally performs. *See Hunt v. Bennett*, 17 F.3d 1263, 1266 (10th Cir. 1994). The Court also looks at the expectation of the parties and whether they dealt with the judge in her judicial capacity. *See id.* Plaintiff has not alleged that Judge Dreiling lacks any colorable claim of jurisdiction over his wife's estate. Plaintiff's allegations regarding Judge Dreiling's actions as a probate judge are thus barred.

IT IS THEREFORE ORDERED that the Motion to Dismiss on Behalf of the Honorable Jan Dreiling (# 2) is GRANTED; and the above-captioned case is DISMISSED.

ORDERED this 26 day of APRIL, 2000.

TERRY C. KERN, CHIEF
UNITED STATES DISTRICT JUDGE

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OKLAHOMA

DELMER B. GARRETT,	)	
	)	
Plaintiff,	)	
	)	
v.	)	**Case No. 00-CV-138-K (E)**
	)	
KAREN WALSH and JAN DRIELING,	)	
	)	
Defendant.	)	

ORDER

Before the Court are Defendant Karen Walsh's motions to dismiss Plaintiff's complaint and amended complaint. Defendant Walsh argues that Plaintiff must obtain leave of the bankruptcy court before instituting a suit against her, that she is immune from any suit in her personal capacity, and that Plaintiff has otherwise failed to state a claim upon which relief could be granted. *See* Fed. R. Civ. P. 12(b)(6).

History of Case

This is one of many suits filed by Plaintiff, his son, and his wife's estate against judges, district attorneys, witnesses, and other persons involved in state and federal court proceedings surrounding the Garretts. In this case, Plaintiff is attempting to sue the judge presiding over the probate proceedings for his spouse's estate and the court-appointed trustee in his son's bankruptcy proceedings – Jan Dreiling and Karen Walsh, respectively. Jan Dreiling is an Associate District Judge of the Washington County District Court. Plaintiff's amended complaint alleges that Judge Dreiling and Ms. Walsh conspired to cloud title on

however, to sue a trustee for her acts or transactions in carrying on business connected with bankruptcy property. *See* 28 U.S.C. § 959(a). This "carrying on business" exception is not available for suits against the trustee for actions taken while administering the estate, such as filing suit to recover a fraudulent conveyance. *See Allard*, 991 F.2d at 1241. Therefore, Plaintiff must obtain leave of the bankruptcy court before filing suit against Defendant Walsh for her actions as a trustee in filing an adversary proceeding to recover a fraudulent conveyance.

IT IS THEREFORE ORDERED that Defendant Karen Walsh's Motion to Dismiss Amended Petition for Failure to State a Claim for Which Relief Can Be Granted (# 9) is GRANTED; Defendant Karen Walsh's Motion to Dismiss for Failure to State a Claim for Which Relief Can Be Granted (# 3) is DENIED as MOOT; and all claims in the above-captioned matter against Defendant Karen Walsh are DISMISSED.

ORDERED this 26 day of APRIL, 2000.

TERRY C. KERN, CHIEF
UNITED STATES DISTRICT JUDGE

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OKLAHOMA

DWAYNE M. GARRETT,	)	
	)	
Plaintiff,	)	
	)	
v.	)	**No. 99-CV-407-K (E)**
	)	
SHELLY CLEMENES, for the State of Oklahoma City of Bartlesville; JERRY MADDUX, city attorney for the City of Bartlesville; CITY OF BARTLESVILLE,	)	
	)	
Defendants.	)	

ORDER

By Order, filed January 21, 2000, the Court gave Plaintiffs twenty days in which to serve Defendants with a summons and complaint or face dismissal of their claims against Defendants under Fed. R. Civ. P. 4(m). Plaintiff has failed to comply with this Order, warranting dismissal of their claims against the remaining defendants, Shelly Clemenes and Jerry Maddux.

IT IS THEREFORE ORDERED that the above-captioned case is DISMISSED WITHOUT PREJUDICE.

ORDERED this 26 day of April, 2000.

TERRY C. KERN, CHIEF
UNITED STATES DISTRICT JUDGE

12

IN THE UNITED STATES DISTRICT COURT FOR THE
NORTHERN DISTRICT OF OKLAHOMA

JAMES F. BELLA,

Plaintiff,

vs.

INTERNAL REVENUE SERVICE, DEPARTMENT OF THE TREASURY, UNITED STATES OF AMERICA,

Defendant.

Case No. 99-CV-1063-C

ORDER

The Court has before it government's Motion to Dismiss in which government advises that plaintiff filed the subject action on December 14, 1999, and on that same date, filed a separate petition in the United States Court of Federal Claims raising the identical issue. In both cases, plaintiff is seeking refund of an alleged overpayment of income taxes paid for the period ending December 31, 1993. The action filed in the Federal Court of Claims is ongoing. Plaintiff admits that the cases are identical but requests the Court to stay any schedule activity in this case until after the Federal Court of Claims case has concluded.

Government's motion to dismiss is granted. It is a waste of judicial economies to allow plaintiff to prosecute his case in separate federal forums or to allow plaintiff to forum shop for a favorable result. The issuance of this order renders moot all other pending motions.

IT IS SO ORDERED this 27th day of April, 2000.

H. DALE COOK
Senior U.S. District Judge

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OKLAHOMA

LAWRENCE ANDREW KOZLOWSKI,)
)
Petitioner,)
)
vs.) No. 99-CV-987 C (M)
)
REGINALD HINES, Warden,)
)
Respondent.)

JUDGMENT

This matter came before the Court upon Petitioner's petition for writ of habeas corpus. The Court duly considered the issues and rendered a decision herein.

IT IS THEREFORE ORDERED, ADJUDGED, AND DECREED that Petitioner's action herein is dismissed without prejudice to refiling same, for failure to exhaust state remedies.

SO ORDERED THIS 27th day of April, 2000.

H. DALE COOK, Senior Judge
UNITED STATES DISTRICT COURT

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OKLAHOMA

LAWRENCE ANDREW KOZLOWSKI,

Petitioner,

vs.

REGINALD HINES, Warden,

Respondent.

No. 99-CV-987 C (M)

ORDER

Before the Court is the 28 U.S.C. § 2254 petition for writ of habeas corpus filed by Petitioner, a state prisoner appearing *pro se*. In response to the petition, Respondent filed a motion to dismiss for failure to exhaust state remedies (Docket #4). Respondent asserts that the petition must be dismissed because Petitioner has never presented his claims to the state courts of Oklahoma and he has an available remedy, a state petition for writ of habeas corpus. Petitioner has not filed a response to the motion to dismiss.

The Supreme Court "has long held that a state prisoner's federal petition should be dismissed if the prisoner has not exhausted available state remedies as to any of his federal claims." Coleman v. Thompson, 111 S. Ct. 2546, 2554-55 (1991). To exhaust a claim, Petitioner must have "fairly presented" that specific claim to the Oklahoma Court of Criminal Appeals. See Picard v. Conner, 404 U.S. 270, 275-76 (1971). The exhaustion requirement is based on the doctrine of comity. Darr v. Burford, 339 U.S. 200, 204 (1950). Requiring exhaustion "serves to minimize friction between our federal and state systems of justice by allowing the State an initial opportunity to pass upon and correct alleged violations of prisoners' federal rights." Duckworth v. Serrano, 454 U.S. 1, 3 (1981) (*per curiam*).

It is clear from the record in this case that Petitioner has not exhausted any of the claims raised in the instant petition. In addition, because Petitioner contends he would be entitled to immediate release if habeas corpus relief were granted, he has an available remedy, a state petition for writ of habeas corpus. See Canady v. Reynolds, 880 P.2d 391, 401 (Okla. Crim. App. 1994). The Court also notes that Petitioner has not responded to Respondent's motion to dismiss. This constitutes a waiver of objection to the motion, and a confession of the matters raised by the motion. See Local Rule 7.1(C). The Court concludes that Respondent's motion to dismiss should be granted and the petition for writ of habeas corpus should be dismissed without prejudice for failure to exhaust state remedies.

ACCORDINGLY, IT IS HEREBY ORDERED that:

1. Respondent's motion to dismiss (Docket #4) is **granted.**
2. The petition for a writ of habeas corpus is **dismissed without prejudice** for failure to exhaust state remedies.

SO ORDERED THIS 27 day of April, 2000.

H. DALE COOK, Senior Judge
UNITED STATES DISTRICT COURT

IN THE UNITED STATES DISTRICT COURT FOR THE
NORTHERN DISTRICT OF OKLAHOMA

PHILLIP HORACEK and ELIZABETH HORACEK,

Plaintiffs,

v.

RESOLUTION GGF OY, a foreign corporation,

Defendant.

Case No. 00CV0067-E

ORDER

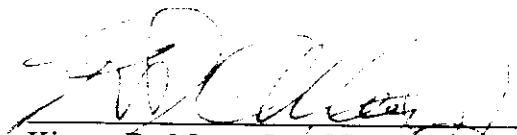
This matter comes on for consideration of the Stipulation of Dismissal filed herein by the parties pursuant to Rule 41(a)(1) of the Federal Rules of Civil Procedure. The Court, having reviewed the Stipulation, finds that it is in all respects proper.

IT IS THEREFORE ORDERED that the referenced case be and same is hereby dismissed. All parties to pay their own costs and attorney's fees.

UNITED STATES DISTRICT JUDGE

Approved:

Eric M. Daffern, OBA #13419
DUNN & DAFFERN
2828 East 51st Street, Suite 400
Tulsa, Oklahoma 74105-1748
Telephone: (918) 746-7640
Fax: (918) 746-7641
ATTORNEYS FOR PLAINTIFFS



Kieran D. Maye, Jr., OBA #11419
ANDREWS DAVIS LEGG BIXLER
MILSTEN & PRICE
500 West Main, Suite 500
Oklahoma City, Oklahoma 73102
Telephone: (405) 272-9241
Fax: (405) 235-8786
ATTORNEYS FOR DEFENDANT

IN THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF OKLAHOMA

FILED

APR 26 2000

Phil Lombardi, Clerk
U.S. DISTRICT COURT

EXOKO, L.L.C.,

Plaintiff,

v.

ENVIROTEK FUEL SYSTEMS, INC.,

Defendant,

v.

STEVEN MARK WOOD,

Counterclaim-Defendant.

Case No. 97-CV-627-E (J)

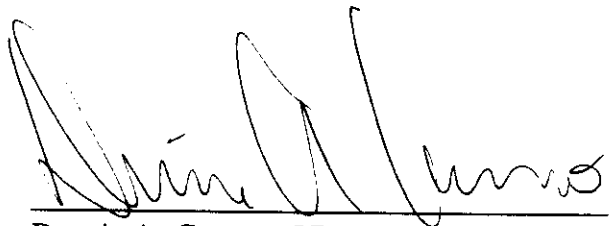
ENTERED ON DOCKET
DATE APR 26 2000

DISMISSAL WITH PREJUDICE

The Plaintiff, Exoko, L.L.C., by and through its attorneys of record, hereby dismisses this case WITH PREJUDICE to re-filing same. Defendant, Envirotek Fuel Systems, Inc., by and through its attorneys of record, hereby dismisses WITH PREJUDICE its Counterclaim against Plaintiff and Counterclaim Defendant, Steven Mark Wood. Each party agrees to bear its own attorneys' fees and costs.

Joseph R. Farris, OBA No. 2835
Paula J. Quillin, OBA No. 7368
FELDMAN, FRANDEN, WOODARD,
FARRIS & TAYLOR
525 South Main, Suite 1000
Tulsa, Oklahoma 74103
(918) 583-7129

ATTORNEYS FOR PLAINTIFF, EXOKO, L.L.C. AND COUNTERCLAIM DEFENDANT, STEVEN MARK WOOD



Dennis A. Caruso, OBA No. 11786
Terry J. Barker, OBA No. 12553
Gene G. Boerner, III, OBA No. 17577
PEZOLD, CARUSO, BARKER & WOLTZ
15 West Sixth Street, Suite 2800
Tulsa, Oklahoma 74119-5415
(918) 584-0506
(918) 584-0720 facsimile

ATTORNEYS FOR DEFENDANT
ENVIROTEK FUEL SYSTEMS, INC.

IN THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF OKLAHOMA

PEGGY J. LEOPARD, Plaintiff, v. NEENA INN, INC., an Oklahoma corporation, Defendant.	)	Case No. 99-CV-462-K

STIPULATION OF DISMISSAL WITH PREJUDICE

COME NOW Plaintiff and Defendant and stipulate to the dismissal of the above styled and numbered cause with prejudice to any future action, each party to bear his or its own costs and attorneys' fees, the parties having consummated complete settlement of the issues between them.

Respectfully submitted,

FRASIER, FRASIER & HICKMAN, LLP

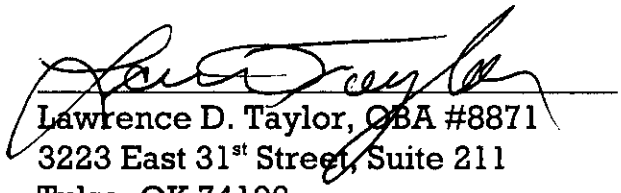
By: _____

Steven R. Hickman, OBA #4172
1700 Southwest Blvd.
P.O. Box 799
Tulsa, OK 74101-0799
Phone: (918) 584-4724
Fax: (918) 583-5637
E-mail: frasier@tulsa.com

Attorneys for Plaintiff

SRH/vlt
21 April 2000
D:\clients\leopard 990716\stip of dismiss with prej.wpd

LAW OFFICE OF LAWRENCE D. TAYLOR

By: 

Lawrence D. Taylor, OBA #8871
3223 East 31st Street, Suite 211
Tulsa, OK 74106
Phone: (918) 749-9131

Attorney for Defendant

SRH/vlt
21 April 2000
D:\clients\leopard 990716\stip of dismiss with prej.wpd

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OKLAHOMA

GALAND L. MOORE,

Plaintiff,

vs.

WASHINGTON COUNTY COURTHOUSE,

Defendant.

Case No. 00-CV-022-E (E)

ORDER

On January 10, 2000, Plaintiff, a prisoner incarcerated at the Washington County Jail and appearing *pro se*, submitted for filing a 42 U.S.C. § 1983 civil rights complaint (#1). In his complaint, Plaintiff alleges that Defendant opened his "federal mail" outside Plaintiff's presence. However, Plaintiff failed to either pay the $150 filing fee or submit a motion for leave to proceed *in forma pauperis* as required by 28 U.S.C. § 1915(a). By Order dated February 2, 2000 (Docket #2), Plaintiff was directed to cure the filing fee deficiency by either paying the filing fee in full or submitting a motion for leave to proceed *in forma pauperis*. The Court imposed a deadline of March 5, 2000, for compliance with the Order. Plaintiff was advised that "[f]ailure to comply with this order may result in the dismissal of this action without prejudice."

To date, Plaintiff has failed to cure the filing fee deficiency as directed in the February 2, 2000 Order. The Court notes that no mail from the Court to Plaintiff has been returned. Therefore, the Court finds that this action should be dismissed without prejudice pursuant to Fed. R. Civ. P. 41(b) based on Plaintiff's failure to comply with the Court's Order.

3

ACCORDINGLY, IT IS HEREBY ORDERED that this action is **dismissed without prejudice** as a result of Plaintiff's failure to comply with the Court's Order. See Fed. R. Civ. P. 41(b). This Order constitutes a final order in this case.

SO ORDERED THIS 15TH day of April, 2000.

JAMES O. ELLISON, Senior Judge
UNITED STATES DISTRICT COURT

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OKLAHOMA

FILED

APR 25 2000

Phil Lombardi, Clerk
U.S. DISTRICT COURT

JIMMIE D. JOICE,
Plaintiff,

v.

KENNETH S. APFEL,
Commissioner,
Social Security Administration,
Defendant.

Case No. 99-CV-534-EA

ENTERED ON DOCKET

DATE APR 26 2000

ORDER

Upon the motion of the defendant, Commissioner of the Social Security Administration, by Stephen C. Lewis, United States Attorney of the Northern district of Oklahoma, through Virginia Watson, Special Assistant United States Attorney, it is hereby ORDERED that this case be reversed and remanded to the Commissioner for further administrative action pursuant to sentence 4 of section 205(g) of the Social Security Act, 42 U.S.C. § ~~1405~~ 405(g).

THUS DONE AND SIGNED on this 25th day of April 2000.

Claire V Eagan

CLAIRE V. EAGAN
United States Magistrate Judge

UNITED STATES DISTRICT COURT FOR THE
NORTHERN DISTRICT OF OKLAHOMA

JIMMIE D. JOICE,
SSN: 443-50-2146,

Plaintiff,

v.

KENNETH S. APFEL, Commissioner,
Social Security Administration,

Defendant.

Case No. 99-CV-0534-EA

JUDGMENT

This action has come before the Court for consideration and an Order remanding the case to the Commissioner has been entered. Judgment for the Plaintiff and against the Defendant is hereby entered pursuant to the Court's Order.

It is so ORDERED this 25th day of April, 2000.

Claire V Eagan

CLAIRE V. EAGAN
UNITED STATES MAGISTRATE JUDGE

12

IN THE UNITED STATES DISTRICT COURT FOR THE
NORTHERN DISTRICT OF OKLAHOMA

Jesus Christ God ex-rel, JAMES RALPH WHITSELL, JR., et al.	)	ENTERED ON DOCKET
	)	DATE APR 26 2000
Plaintiff,	)	
vs.	)	No. 00-CV-274-K (E)
UNITED STATES OF AMERICA,	)	
Defendant.	)	

FILED
APR 25 2000
Phil Lombardi, Clerk
U.S. DISTRICT COURT

ORDER

Plaintiff, appearing *pro se*, has filed a civil rights complaint, a motion to proceed *in forma pauperis* (doc. 10), and a motion for hearing (doc. 7).

A. Motion for leave to proceed *in forma pauperis* (docket no. 10)

Based on the representations contained in the motion, the Court finds that Plaintiff is, or was, incarcerated at the David L. Moss Correctional Center from January 9, 2000 through March 9, 2000. On April 6, 2000, Plaintiff filed the instant motion for leave to proceed *in forma pauperis*, stating he is without funds. Accordingly, the Court finds that based upon Plaintiff's representations, his motion for leave to proceed *in forma pauperis* should be granted.

B. Complaint

In his original complaint (doc. 1), Plaintiff, identified as "Jesus Christ God ex-rel James Ralph Whitsell Jr. Word of God," has sued "United States of America" as the sole

12

Defendant in this civil rights action. On April 6, 2000, Plaintiff filed several additional "petitions," naming various parties, which were docketed as follows:

Doc. #3	James Ralph Whitsell Jr. ex-rel United States Jesus Christ God Word of God, Plaintiff, vs. CCA David Moss Criminal Justice Center; Tulsa ex-rel State of Oklahoma USA, Defendant
Doc. #4	James Ralph Whitsell Jr. ex-rel United States Jesus Christ God Word of God, Plaintiff, vs. CCA David L. Moss Criminal Justice Center; Tulsa ex-rel State of Oklahoma USA, Defendant
Doc. #5	James Ralph Whitsell Jr. ex-rel United States Jesus Christ God Word of God, Plaintiff, vs. CCA David L. Moss Criminal Justice Center Tulsa ex-rel State of Okla. USA, Defendant
Doc. #6	James Ralph Whitsell Jr. ex-rel United States Jesus Christ God Word of God, Plaintiff, vs. United States of America, Defendant
Doc. #8	Jesus Christ God, Word of God ex-rel James Ralph Whitsell, Jr. U.S., Plaintiff, vs. United States of America, Defendant

Further, attached to his motion for leave to proceed *in forma pauperis* (doc. 10), Plaintiff has attached another civil rights complaint on the court-approved form and two more handwritten complaints in which Plaintiff identifies himself as "James Ralph Whitsell Jr. ex-rel United States" and the Defendant as "CCA - David L. Moss Criminal Justice Center."

In cases, like the instant case, where the plaintiff is proceeding *in forma pauperis*, the Court *shall* dismiss at any time all or any part of such complaint which (1) is frivolous or malicious; (2) fails to state a claim on which relief can be granted (see discussion of

Complaint, below); or (3) seeks monetary relief from a defendant who is immune from such relief. *See* 28 U.S.C. § 1915(e)(2)(B).

In addition to the inconsistencies in naming the parties to this suit, even if the allegations in Plaintiff's Civil Rights Complaint(s) are accepted as true, the Court finds the complaint fails to state a claim upon which relief can be granted as to either "United States of America" or "CCA-David L. Moss Criminal Justice Center." A court may dismiss a complaint for failure to state a claim only if it is clear that the plaintiff can prove no set of facts in support of his claim entitling him to relief. *See Conley v. Gibson*, 355 U.S. 41, 45-46 (1957); *Calderon v. Kansas Dep't of Social & Rehabilitative Servs.*, 181 F.3d 1180, 1183 (10th Cir. 1999). For purposes of making this determination, a court must accept the well-pleaded allegations of the complaint as true and construe them in the light most favorable to the plaintiff. *See Realmonte v. Reeves*, 169 F.3d 1280, 1283 (10th Cir. 1999). Numerous courts have held that these entities are not "persons" that can be sued under the statute, and actions of the federal government are "facially exempt" from 42 U.S.C. § 1983. *See District of Columbia v. Carter*, 409 U.S. 418, 425 (1973) (noting that the federal government is at least facially exempt from section 1983); *Martinez v. Winner*, 771 F.2d 424, 444 (10th Cir. 1985), *vacated on other grounds*, *Tyus v. Martinez*, 475 U.S. 1138 (1986) (noting that governmental sub-units are not proper defendants under section 1983); *see also Johnson v. City of Erie*, 834 F. Supp. 873, 878-79 (W.D. Pa. 1993) (finding that municipal police departments are not proper defendants under section 1983); *PBA Local No. 38 v. Woodbridge*

Police Dep't, 832 F. Supp. 808, 825-26 (D.N.J. 1993) (collecting cases finding same). Furthermore, while courts are required liberally to construe *pro se* complaints, *see Haines v. Kerner,* 404 U.S. 519, 520 (1972) (per curiam), Plaintiff's incoherent ramblings fail to allege with specificity what act or conduct, when, and by whom violated what constitutional rights, if any.

IT IS THEREFORE ORDERED that Plaintiff's motion for leave to proceed *in forma pauperis* (#10) is GRANTED, and pursuant to 28 U.S.C. § 1915(e)(2)(B)(ii), this action is DISMISSED WITHOUT PREJUDICE. Plaintiff's motion for hearing (#7) is DENIED as MOOT.

ORDERED this 25 day of April, 2000.

TERRY C. KERN, Chief Judge
United States District Court

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OKLAHOMA

PAMELA D. GOURLEY,	)	ENTERED ON DOCKET
	)	
Plaintiff,	)	DATE APR 26 2000
	)	
v.	)	**Case No. 98-CV-966-K (J)**
	)	
WORTHINGTON INDUSTRIES and WORTHINGTON CYLINDER CORPORATION,	)	**F I L E D**
	)	APR 25 2000
Defendants.	)	Phil Lombardi, Clerk U.S. DISTRICT COURT

JUDGMENT

This matter came before the Court for consideration of Defendant's Motion for Summary Judgment. The issues having been duly considered and a decision having been rendered in accordance with the Order filed contemporaneously herewith,

IT IS THEREFORE ORDERED, ADJUDGED, AND DECREED that judgment is hereby entered for the Defendant, Worthington Cylinder Corporation, and against the Plaintiff, Pamela D. Gourley.

ORDERED THIS 24 DAY OF APRIL, 2000.

Terry C. Kern

TERRY C. KERN, CHIEF
UNITED STATES DISTRICT JUDGE

50

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OKLAHOMA

PAMELA D. GOURLEY,	)	ENTERED ON DOCKET
	)	
Plaintiff,	)	DATE APR 26 2000
	)	
v.	)	Case No. 98-CV-966-K (J)
	)	
WORTHINGTON INDUSTRIES and WORTHINGTON CYLINDER CORPORATION,	)	FILED
	)	APR 25 2000
Defendants.	)	Phil Lombardi, Clerk U.S. DISTRICT COURT

ORDER

Before the Court is Defendant Worthington Cylinder Corporation's ("Worthington's")[1] motion for summary judgment. Worthington contends that the Court lacks subject matter jurisdiction over Plaintiff's sexual harassment claim, because Plaintiff cannot show that she suffered any sexual harassment within 300 days of her filing of a Charge of Discrimination with the Equal Employment Opportunity Commission ("EEOC"). In the alternative, Defendant argues that it is entitled to judgment on this claim, because it promptly investigated and took appropriate action. Defendant also argues that Plaintiff fails to show that her work conditions were sufficiently intolerable and the reason she left Worthington, as required for her constructive discharge claim.[2]

---

[1]The parties dismissed Worthington Industries by stipulation, filed June 3, 1999.

[2] Defendant's motion for summary judgment also addresses Plaintiff's denial of promotion, unequal pay, and intentional infliction of emotional distress claims. However, Plaintiff abandons these claims in her response, either explicitly, as in the case of the former two, or by failure to respond, as in the case of the latter.

49

History of Case

Plaintiff began working at Worthington as a seasonal employee in January, 1997. Around May 22, 1997, she filed a formal complaint against another seasonal employee, Buddy Buie, for sexual harassment. She also alleged that Buie had harassed other women. Buie worked on the same line and shift as Plaintiff. Plaintiff's group leader, Angel Menendez completed a Vital Incident Report and informed his supervisor, Jerry Amos, of the complaint. Mr. Amos then discussed Plaintiff's complaint with her and Buie. He then suspended Buie, pending investigation. Cindy Amos, a Worthington supervisor, interviewed Plaintiff and some other employees regarding the charges and completed Vital Incident Reports for each interview. When the plant manager, Bob Kotarba, returned from vacation, he met with Mr. and Ms. Amos. Although he initially considered terminating Buie, he continued the investigation. He interviewed Plaintiff and other female employees, a male employee, and Menendez. On May 31, 1997, Worthington issued an Employee Disciplinary Report, signed by Mr. Amos. That report stated that Kotarba and Mr. Amos determined the allegations to be inconclusive but that Buie had participated in improper conduct. Any further infractions by Buie would result in termination, the report continued. Buie's suspension for three days remained without pay. Moreover, Worthington transferred Buie to a different line on the only other shift, night/evening shift. Plaintiff continued to encounter Buie during shift changes, when she alleges that he verbally taunted her and made gestures toward her. After accepting employment elsewhere, Plaintiff gave Worthington

two weeks notice and resigned from her job, effective July 18, 1997. Plaintiff completed a "Mail In Information Sheet for Filing a Charge of Discrimination," which the EEOC received on April 20, 1998. By letter, dated April 27, 1998, the EEOC acknowledged Plaintiff's charge, which had been assigned a charge number, and asked Plaintiff to verify the information on the formal Charge of Discrimination, sign, date, and return it to the EEOC. Plaintiff filed this formal Charge of Discrimination on May 15, 1998.

Summary Judgment Standard

Summary judgment is appropriate if "there is no genuine issue as to any material fact and . . . the moving party is entitled to a judgment as a matter of law." Fed. R. Civ. P. 56(c). The Court must view the evidence and draw any inferences in a light most favorable to the party opposing summary judgment, but that party must identify sufficient evidence which would require submission of the case to a jury. *See Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 249-52 (1986); *Mares v. ConAgra Poultry Co.*, 971 F.2d 492, 494 (10th Cir. 1992). Where the nonmoving party will bear the burden of proof at trial, that party must go beyond the pleadings and identify specific facts which demonstrate the existence of an issue to be tried by the jury. *See Mares*, 971 F.2d at 494. Additionally, although the non-moving party need not produce evidence at the summary judgment stage in a form that is admissible at trial, the content or substance of such evidence must be admissible. *See Thomas v. International Bus. Machs.*, 48 F.3d 478, 485 (10th Cir. 1995).

Timeliness of Plaintiff's Discrimination Charge

A timely filed charge of discrimination is a prerequisite to suit under Title VII of the Civil Rights Act of 1964, 42 U.S.C. §§ 2000e *et seq*. *See Bullington v. United Air Lines*, 186 F.3d 1301, 1310 (10th Cir. 1999). In a deferral state like Oklahoma, the claimant must file a charge within 300 days after the alleged unlawful employment practice. *See* 42 U.S.C. § 2000e-5(e)(1).

Plaintiff's verified Charge of Discrimination relates back to April 20, 1998, the date the EEOC received her unverified complaint. Title VII requires that charges be made in writing under oath or affirmation and contain such information and be in such form as the EEOC requires. *See* 42 U.S.C. § 2000e-5(b). EEOC regulations set out the necessary contents of a charge. *See* 29 C.F.R. § 1601.12(a). However, EEOC regulations deem a charge sufficient when the EEOC receives "a written statement sufficiently precise to identify the parties, and to describe generally the action or practices complained of." *Id.* § 1601.12(b). Moreover, the EEOC allows a charge to be amended to cure technical defects or omissions, including failure to verify the charge. Such amendments relate back to the date the EEOC first received the charge. *See id.* The Tenth Circuit has interpreted this provision as allowing an untimely formal charge to relate back to amend a timely, unverified complaint, at least where there is no showing of prejudice to the defendant. *See Peterson v. City of Wichita*, 888 F.2d 1307, 1309 (10th Cir. 1989). Defendant has made no such

showing. Therefore, Plaintiff's Title VII claims will not be barred as untimely, if Defendant discriminated against her on or after June 24, 1997.

Under the continuing violation doctrine, Plaintiff may sue for incidents occurring prior to June 24, 1997, if she can show (a) one incident occurring on or after that date; and (b) that the earlier acts were part of a continuing pattern of discrimination. *See Bullington*, 186 F.3d at 1310. The justification for the continuing violation doctrine is the equitable notion that the statute of limitations should not begin to run until a reasonable person would be aware that her rights had been violated. *See id.* at 1311. The Court may consider the following three factors in determining whether a continuing pattern existed: (1) subject matter, that is whether the violations constitute the same type of discrimination; (2) frequency; and (3) permanence, that is whether the nature of the violations would trigger Plaintiff's awareness of the need to assert her rights and whether the consequences of the act would continue even in absence of a continuing intent to discriminate. *See id.* at 1310. This is not a bright-line test but merely a tool to assist the Court in its analysis of whether the pattern was continuing. *See id.* at 1311 n.4.

Plaintiff's complaint to the EEOC was untimely, because she has put forward no evidence of any discriminatory act occurring on or after June 24, 1997. While the act occurring within the statutory period need not violated Title VII when viewed alone, a plaintiff cannot merely allege the continuing effects of prior acts. *See Robbins v. Jefferson County Sch. Dist. R-1*, 186 F.3d 1253, 1257 (10th Cir. 1999). She must affirmatively show

that events before and after this cutoff date "share commonality and are related acts of discrimination." *See id.* Plaintiff has put forward no evidence of any acts occurring from June 24 until she resigned on July 18, 1997. She has testified that after Buie was transferred to the second shift, he would come in a little early and stare at her, give her dirty looks, point and talk with people and laugh, and make body gestures. Plaintiff testifies that she complained of this behavior right after she discovered that Buie had not been fired, which she dates as late May. She also testifies that the behavior occurred prior to her writing a letter that is dated June 4, 1997. There is no evidence of any harassment occurring after this date. Therefore, Plaintiff lacks any acts occurring on or after June 24, 1997, that can form part of a continuing violation. Rather, the only event occurring after this date is her resignation, which is the effect of any prior discrimination rather than the sort of discriminatory acts necessary under this doctrine.

Even if the evidence could be interpreted as showing an incident on or after June 24, 1997, the prior allegations would not form part of a continuing violation. The evidence demonstrates that Plaintiff knew that Defendant was not going to fire Buie and believed that the transfer did not remedy the harassment situation long before June 24th. By the beginning of June, a reasonable person would know that her rights had been violated, and the evidence demonstrates that Plaintiff believed this to be the case. Plaintiff testifies that she met with the plant manager several times in the two weeks following Buie's transfer to complain about the company's refusal to fire him or, if it had fired him, its rehiring of him.

During that period, she also made repeated requests for her original complaint out of fear that she was going to lose her job. These actions indicate an actual belief by Plaintiff that she had been wronged. Because the alleged violations fail the permanence factor outlined above, Plaintiff cannot argue that the acts prior to June 24, 1997, form part of a continuing violation with any events occurring after that date.

Equitable tolling is not appropriate in this case. Plaintiff has put forward no evidence warranting a tolling of the filing limitations, and the Court finds none present in the record. The time limits set out in section 2000e-5(e)(1) will be tolled only where the plaintiff has been actively deceived regarding the procedural prerequisites of bringing her case. *See Robbins*, 186 F.3d at 1258.

Constructive Discharge

Defendant is entitled to summary judgment on Plaintiff's constructive discharge claim. Under this claim, Plaintiff must show that the working conditions were so intolerable that a reasonable person would resign. *See Daemi v. Church's Fried Chicken, Inc.*, 931 F.2d 1379, 1386 (10th Cir. 1991); *see also Reynolds v. School Dist. No. 1*, 69 F.3d 1523, 1534 (10th Cir. 1995) (constructive discharge under 42 U.S.C. § 1981).

Plaintiff has put forward no evidence of working conditions so intolerable that a reasonable person would resign. Even assuming that Buie showed up every day near the end of her shift and pointed and laughed at her, whispered, stared, and made gestures toward her, this conduct is not so severe as to create constructive discharge. Rather, given the lack of

physical contact between Plaintiff and Buddy Buie following Defendant's corrective action, his conduct is closer to a mere offensive utterance insufficient to support a constructive discharge claim. Furthermore, that Plaintiff did not resign until after she had obtained alternative employment indicates that the situation was not subjectively intolerable, as well. While Buddy Buie's behavior may have provided the impetus to work elsewhere, it did not render this Plaintiff's only tolerable option.

Conclusion

Because Plaintiff's EEOC complaint was not filed within 300 days of the alleged unlawful employment practice, Plaintiff has not fulfilled the prerequisites to a suit under Title VII. Defendant is also entitled to judgment on Plaintiff's claim for constructive discharge, because Plaintiff cannot show that the conditions were so intolerable that a reasonable person would resign.

IT IS THEREFORE ORDERED that Defendant Worthington Cylinder Corporation's Motion for Summary Judgment (# 18) is GRANTED.

ORDERED THIS 24 DAY OF APRIL, 2000.

TERRY C. KERN, CHIEF
UNITED STATES DISTRICT JUDGE

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OKLAHOMA

APRIL K. BAILEY, Plaintiff, v. WORTHINGTON INDUSTRIES and WORTHINGTON CYLINDER CORPORATION, Defendants.	)	ENTERED ON DOCKET DATE APR 26 2000 Case No. 98-CV-965-K (M) FILED APR 25 2000 Phil Lombardi, Clerk U.S. DISTRICT COURT

JUDGMENT

This matter came before the Court for consideration of Defendant's Motion for Summary Judgment. The issues having been duly considered and a decision having been rendered in accordance with the Order filed contemporaneously herewith,

IT IS THEREFORE ORDERED, ADJUDGED, AND DECREED that judgment is hereby entered for the Defendant, Worthington Cylinder Corporation, and against the Plaintiff, April K. Bailey.

ORDERED THIS 24 DAY OF APRIL, 2000.

TERRY C. KERN, CHIEF
UNITED STATES DISTRICT JUDGE

55

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OKLAHOMA

APRIL K. BAILEY,	)	ENTERED ON DOCKET
	)	DATE APR 26 2000
Plaintiff,	)	
	)	
v.	)	**Case No. 98-CV-965-K (M)**
	)	
WORTHINGTON INDUSTRIES and WORTHINGTON CYLINDER CORPORATION,	)	**FILED**
	)	APR 25 2000
	)	Phil Lombardi, Clerk U.S. DISTRICT COURT
Defendants.	)	

ORDER

Before the Court is Defendant Worthington Cylinder Corporation's ("Worthington's")[1] motion for summary judgment. Worthington contends that the Court lacks subject matter jurisdiction over Plaintiff's sexual harassment claim, because Plaintiff cannot show that she suffered any sexual harassment within 300 days of her filing of a Charge of Discrimination with the Equal Employment Opportunity Commission ("EEOC"). In the alternative, Defendant argues that it is entitled to judgment on this claim, because it promptly investigated and took appropriate action. Defendant also argues that Plaintiff fails on a retaliatory discharge claim because such claim was raised for the first time in her response to the present motion and was not raised in her Charge of Discrimination .[2]

---

[1]The parties dismissed Worthington Industries by stipulation, filed June 3, 1999.

[2] Defendant's motion for summary judgment also addresses Plaintiff's denial of promotion, unequal pay, and intentional infliction of emotional distress claims. However, Plaintiff abandons these claims in her response, either explicitly, as in the case of the former two, or by failure to respond, as in the case of the latter.

524

History of Case

Plaintiff began working at Worthington as a seasonal employee in December, 1996. Around May 22, 1997, plaintiff told supervisor Cindy Amos that she had been harassed by another seasonal employee, Buddy Buie. Buie worked on the same line and shift as Plaintiff. The allegations were investigated by Worthington and on or about May 30, 1997, Buie was suspended, transferred to another shift, and received written discipline. Plaintiff was laid off on August 15, 1997 with various other employees as part of a layoff of seasonal employees.

Plaintiff completed a "Mail In Information Sheet for Filing a Charge of Discrimination," which the EEOC received on April 20, 1998. By letter, dated April 27, 1998, the EEOC acknowledged Plaintiff's charge, which had been assigned a charge number, and asked Plaintiff to verify the information on the formal Charge of Discrimination, sign, date, and return it to the EEOC. Plaintiff filed this formal Charge of Discrimination on May 15, 1998.

Summary Judgment Standard

Summary judgment is appropriate if "there is no genuine issue as to any material fact and . . . the moving party is entitled to a judgment as a matter of law." Fed. R. Civ. P. 56(c). The Court must view the evidence and draw any inferences in a light most favorable to the party opposing summary judgment, but that party must identify sufficient evidence which would require submission of the case to a jury. *See Anderson v. Liberty Lobby, Inc.*, 477 U.S.

242, 249-52 (1986); *Mares v. ConAgra Poultry Co.*, 971 F.2d 492, 494 (10th Cir. 1992). Where the nonmoving party will bear the burden of proof at trial, that party must go beyond the pleadings and identify specific facts which demonstrate the existence of an issue to be tried by the jury. *See Mares*, 971 F.2d at 494. Additionally, although the non-moving party need not produce evidence at the summary judgment stage in a form that is admissible at trial, the content or substance of such evidence must be admissible. *See Thomas v. International Bus. Machs.*, 48 F.3d 478, 485 (10th Cir. 1995).

Timeliness of Plaintiff's Discrimination Charge

A timely filed charge of discrimination is a prerequisite to suit under Title VII of the Civil Rights Act of 1964, 42 U.S.C. §§ 2000e *et seq.* *See Bullington v. United Air Lines*, 186 F.3d 1301, 1310 (10th Cir. 1999). In a deferral state like Oklahoma, the claimant must file a charge within 300 days after the alleged unlawful employment practice. *See* 42 U.S.C. § 2000e-5(e)(1).

Defendant contends that the May, 15, 1998 date of formal filing is the proper measuring date. The Court disagrees. Plaintiff's verified Charge of Discrimination relates back to April 20, 1998, the date the EEOC received her unverified complaint. Title VII requires that charges be made in writing under oath or affirmation and contain such information and be in such form as the EEOC requires. *See* 42 U.S.C. § 2000e-5(b). EEOC regulations set out the necessary contents of a charge. *See* 29 C.F.R. § 1601.12(a).

However, EEOC regulations deem a charge sufficient when the EEOC receives "a written statement sufficiently precise to identify the parties, and to describe generally the action or practices complained of." *Id.* § 1601.12(b). Moreover, the EEOC allows a charge to be amended to cure technical defects or omissions, including failure to verify the charge. Such amendments relate back to the date the EEOC first received the charge. *See id.* The Tenth Circuit has interpreted this provision as allowing an untimely formal charge to relate back to amend a timely, unverified complaint, at least where there is no showing of prejudice to the defendant. *See Peterson v. City of Wichita*, 888 F.2d 1307, 1309 (10th Cir. 1989). Defendant has made no such showing. Therefore, Plaintiff's Title VII claims will not be barred as untimely, if Defendant discriminated against her on or after June 24, 1997 (i.e., 300 days before April 20, 1998).

Under the continuing violation doctrine, Plaintiff may sue for incidents occurring prior to June 24, 1997, if she can show (a) one incident occurring on or after that date; and (b) that the earlier acts were part of a continuing pattern of discrimination. *See Bullington*, 186 F.3d at 1310. The justification for the continuing violation doctrine is the equitable notion that the statute of limitations should not begin to run until a reasonable person would be aware that her rights had been violated. *See id.* at 1311. The Court may consider the following three factors in determining whether a continuing pattern existed: (1) subject matter, that is whether the violations constitute the same type of discrimination; (2) frequency; and (3) permanence, that is whether the nature of the violations would trigger

Plaintiff's awareness of the need to assert her rights and whether the consequences of the act would continue even in absence of a continuing intent to discriminate. *See id.* at 1310. This is not a bright-line test but merely a tool to assist the Court in its analysis of whether the pattern was continuing. *See id.* at 1311 n.4.

Plaintiff's allegations are untimely, because she has put forward no evidence of any discriminatory act occurring on or after June 24, 1997. While the act occurring within the statutory period need not violate Title VII when viewed alone, a plaintiff cannot merely allege the continuing effects of prior acts. *See Robbins v. Jefferson County Sch. Dist. R-1*, 186 F.3d 1253, 1257 (10th Cir. 1999). She must affirmatively show that events before and after this cutoff date "share commonality and are related acts of discrimination." *See id.* Plaintiff has put forward no evidence of any sexual harassment occurring from May 30, 1997, when Buie was put on another shift until her layoff on August 15, 1997. Plaintiff testified in her deposition that Buie would give her "looks" occasionally and there was "negative activity in the air." However, she expressly stated "the sexual harassing ha[d] stopped." Therefore, Plaintiff lacks any acts occurring on or after June 24, 1997, that can form part of a continuing violation. Plaintiff's discharge cannot be characterized as an act of sexual harassment which would permit application of the continuing violation theory.

Equitable tolling is not appropriate in this case. Plaintiff has put forward no evidence warranting a tolling of the filing limitations, and the Court finds none present in the record. The time limits set out in section 2000e-5(e)(1) will be tolled only where the plaintiff has

been actively deceived regarding the procedural prerequisites of bringing her case. *See Robbins*, 186 F.3d at 1258.

Retaliatory Discharge

Plaintiff was laid off by defendant on August 15, 1997. This act took place within the 300 days prior to April 20, 1998 and thus will not be rejected as untimely. However, defendant correctly points that plaintiff's complaint alleges a claim of constructive discharge. Defendant moved for summary judgment on the ground that plaintiff did not quit her employment, a prerequisite to a constructive discharge claim. In its response, plaintiff appeared to abandon the constructive discharge claim and asserted plaintiff had been discharged in retaliation for making complaints of sexual harassment. Defendant objects on two grounds (1) the deadline for filing an amended complaint to add a new claim has passed and (2) plaintiff did not raise the claim of retaliatory discharge in her Charge of Discrimination and thus has failed to exhaust remedies.

The Court agrees with defendant on both grounds. It is prejudicial to defendant to defend a new cause of action not raised until the midst of summary judgment briefing. Further, the Tenth Circuit has held that a new claim of retaliation does not relate back to the EEOC charge when the claim was not raised the charge. Simms v. Oklahoma Ex Rel. Dept. of Mental Health, 165 F.3d 1321, 1327 (10th Cir.), cert. denied, 120 S.Ct. 53 (1999).

It is the Order of the Court that Defendant Worthington Cylinder Corporation's Motion for Summary Judgment is GRANTED.

ORDERED THIS 24 DAY OF APRIL, 2000.

TERRY C. KERN, CHIEF
UNITED STATES DISTRICT JUDGE

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OKLAHOMA

APRIL D. STUBBLEFIELD,	)	ENTERED ON DOCKET
	)	
Plaintiff,	)	DATE APR 26 2000
	)	
v.	)	**Case No. 98-CV-967-K (J)**
	)	**F I L E D**
WORTHINGTON INDUSTRIES and WORTHINGTON CYLINDER CORPORATION,	)	APR 25 2000
	)	Phil Lombardi, Clerk U.S. DISTRICT COURT
Defendants.	)	

JUDGMENT

This matter came before the Court for consideration of Defendant's Motion for Summary Judgment. The issues having been duly considered and a decision having been rendered in accordance with the Order filed contemporaneously herewith,

IT IS THEREFORE ORDERED, ADJUDGED, AND DECREED that judgment is hereby entered for the Defendant, Worthington Cylinder Corporation, and against the Plaintiff, April D. Stubblefield.

ORDERED THIS 24 DAY OF APRIL, 2000.

TERRY C. KERN, CHIEF
UNITED STATES DISTRICT JUDGE

47

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OKLAHOMA

APRIL D. STUBBLEFIELD,	)	ENTERED ON DOCKET
	)	
Plaintiff,	)	DATE APR 26 2000
	)	
v.	)	**Case No. 98-CV-967-K (J)**
	)	
WORTHINGTON INDUSTRIES and WORTHINGTON CYLINDER CORPORATION,	)	**F I L E D**
	)	APR 25 2000
Defendants.	)	Phil Lombardi, Clerk U.S. DISTRICT COURT

ORDER

Before the Court is Defendant Worthington Cylinder Corporation's ("Worthington's")[1] motion for summary judgment. Worthington contends that the Court lacks subject matter jurisdiction over Plaintiff's sexual harassment claim, because Plaintiff cannot show that she suffered any sexual harassment within 300 days of her filing of a Charge of Discrimination with the Equal Employment Opportunity Commission ("EEOC"). In the alternative, Defendant argues that it is entitled to judgment on this claim, because it promptly investigated and took appropriate action. Defendant also argues that Plaintiff fails to show that her work conditions were sufficiently intolerable and the reason she left Worthington, as required for her constructive discharge claim.[2]

---

[1]The parties dismissed Worthington Industries by stipulation, filed June 3, 1999.

[2] Defendant's motion for summary judgment also addresses Plaintiff's denial of promotion, unequal pay, and intentional infliction of emotional distress claims. However, Plaintiff abandons these claims in her response, either explicitly, as in the case of the former two, or by failure to respond, as in the case of the latter.

46

History of Case

Plaintiff began working at Worthington as a seasonal employee in January, 1997. Around May 22, 1997, plaintiff told supervisor Cindy Amos that she had been harassed by another seasonal employee, Buddy Buie. She also alleged that Buie had harassed other women. Buie worked on the same line and shift as Plaintiff. The allegations were investigated by Worthington and on or about May 30, 1997, Buie was suspended, transferred to another shift and received written discipline. Plaintiff went on medical leave May 29, 1997. On August 15, 1997 plaintiff received a release to return to work on August 18, 1997. Plaintiff drove to work on August 18, 1997 and saw Buie in the parking lot. She left the premises and never reported to work after that day.

Plaintiff completed a "Mail In Information Sheet for Filing a Charge of Discrimination," which the EEOC received on April 20, 1998. By letter, dated April 27, 1998, the EEOC acknowledged Plaintiff's charge, which had been assigned a charge number, and asked Plaintiff to verify the information on the formal Charge of Discrimination, sign, date, and return it to the EEOC. Plaintiff filed this formal Charge of Discrimination on May 15, 1998.

Summary Judgment Standard

Summary judgment is appropriate if "there is no genuine issue as to any material fact and . . . the moving party is entitled to a judgment as a matter of law." Fed. R. Civ. P. 56(c). The Court must view the evidence and draw any inferences in a light most favorable to the

party opposing summary judgment, but that party must identify sufficient evidence which would require submission of the case to a jury. *See Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 249-52 (1986); *Mares v. ConAgra Poultry Co.*, 971 F.2d 492, 494 (10th Cir. 1992). Where the nonmoving party will bear the burden of proof at trial, that party must go beyond the pleadings and identify specific facts which demonstrate the existence of an issue to be tried by the jury. *See Mares*, 971 F.2d at 494. Additionally, although the non-moving party need not produce evidence at the summary judgment stage in a form that is admissible at trial, the content or substance of such evidence must be admissible. *See Thomas v. International Bus. Machs.*, 48 F.3d 478, 485 (10th Cir. 1995).

Timeliness of Plaintiff's Discrimination Charge

A timely filed charge of discrimination is a prerequisite to suit under Title VII of the Civil Rights Act of 1964, 42 U.S.C. §§ 2000e *et seq.* *See Bullington v. United Air Lines*, 186 F.3d 1301, 1310 (10th Cir. 1999). In a deferred state like Oklahoma, the claimant must file a charge within 300 days after the alleged unlawful employment practice. *See* 42 U.S.C. § 2000e-5(e)(1).

Defendant contends that the May 15, 1998 date of formal filing is the proper measuring date. The Court disagrees. Plaintiff's verified Charge of Discrimination relates back to April 20, 1998, the date the EEOC received her unverified complaint. Title VII requires that charges be made in writing under oath or affirmation and contain such

information and be in such form as the EEOC requires. *See* 42 U.S.C. § 2000e-5(b). EEOC regulations set out the necessary contents of a charge. *See* 29 C.F.R. § 1601.12(a). However, EEOC regulations deem a charge sufficient when the EEOC receives "a written statement sufficiently precise to identify the parties, and to describe generally the action or practices complained of." *Id.* § 1601.12(b). Moreover, the EEOC allows a charge to be amended to cure technical defects or omissions, including failure to verify the charge. Such amendments relate back to the date the EEOC first received the charge. *See id.* The Tenth Circuit has interpreted this provision as allowing an untimely formal charge to relate back to amend a timely, unverified complaint, at least where there is no showing of prejudice to the defendant. *See Peterson v. City of Wichita*, 888 F.2d 1307, 1309 (10th Cir. 1989). Defendant has made such showing. Therefore, Plaintiff's Title VII claims will not be barred as untimely, if Defendant discriminated against her on or after June 24, 1997 (i.e., 300 days before April 20, 1997)..

Under the continuing violation doctrine, Plaintiff may sue for incidents occurring prior to June 24, 1997, if she can show (a) one incident occurring on or after that date; and (b) that the earlier acts were part of a continuing pattern of discrimination. *See Bullington*, 186 F.3d at 1310. The justification for the continuing violation doctrine is the equitable notion that the statute of limitations should not begin to run until a reasonable person would be aware that her rights had been violated. *See id.* at 1311. The Court may consider the following three factors in determining whether a continuing pattern existed: (1) subject

matter, that is whether the violations constitute the same type of discrimination; (2) frequency; and (3) permanence, that is whether the nature of the violations would trigger Plaintiff's awareness of the need to assert her rights and whether the consequences of the act would continue even in absence of a continuing intent to discriminate. *See id.* at 1310. This is not a bright-line test but merely a tool to assist the Court in its analysis of whether the pattern was continuing. *See id.* at 1311 n.4.

Plaintiff's complaint to the EEOC was untimely, because she has put forward no evidence of any discriminatory act occurring on or after June 24, 1997. While the act occurring within the statutory period need not violated Title VII when viewed alone, a plaintiff cannot merely allege the continuing effects of prior acts. *See Robbins v. Jefferson County Sch. Dist. R-1*, 186 F.3d 1253, 1257 (10th Cir. 1999). She must affirmatively show that events before and after this cutoff date "share commonality and are related acts of discrimination." *See id.* Plaintiff has put forward no evidence of any acts occurring from June 24 until she resigned on August 18, 1997. Plaintiff concedes that she was away from the plant on medical leave throughout this period, but argues that had she been present she would have been subjected to continued harassment by Buie. Such speculation cannot prevent the entry of summary judgment.

Equitable tolling is not appropriate in this case. Plaintiff has put forward no evidence warranting a tolling of the filing limitations, and the Court finds none present in the record. The time limits set out in section 2000e-5(e)(1) will be tolled only where the plaintiff has

been actively deceived regarding the procedural prerequisites of bringing her case. *See Robbins*, 186 F.3d at 1258.

Constructive Discharge

Constructive discharge occurs when an employer deliberately makes or allows the employee's working conditions to become so intolerable that the employee has no choice but to quit. Buchanan v. Sherrill, 51 F.3d 227, 229 (10th Cir.1995). Plaintiff has not approached sustaining this burden. She was away from the plant from May 29, 1997 until August 18, 1997. When she returned, she spotted Buie in the parking lot and left, never to return. The mere sighting of an alleged harasser does not render working conditions intolerable. Summary judgment is appropriate.

IT IS THEREFORE ORDERED that Defendant Worthington Cylinder Corporation's Motion for Summary Judgment is GRANTED.

ORDERED THIS 24 DAY OF APRIL, 2000.

TERRY C. KERN, CHIEF
UNITED STATES DISTRICT JUDGE

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OKLAHOMA

DWAYNE GARRETT,	)	ENTERED ON DOCKET
	)	
Plaintiff,	)	DATE APR 26 2000
	)	
v.	)	**Case No. 00-CV-225-K (E)**
	)	
JOE L. WHITE, JOHN LANNING, RICK ESSER, DYNDA POST, STATE OF OKLAHOMA, and JANET RENO,	)	FILED
	)	APR 25 2000
Defendants.	)	Phil Lombardi, Clerk U.S. DISTRICT COURT

ORDER

Before the Court is Defendant State of Oklahoma's motion to dismiss Plaintiff's complaint for insufficiency of process, insufficiency of service of process, and failure to state a claim upon which relief could be granted. *See* Fed. R. Civ. P. 12(b)(4)-(6).

Failure to State a Claim

Applicable Law

A court may dismiss a complaint for failure to state a claim only if it is clear that the plaintiff can prove no set of facts in support of his claim entitling him to relief. *See Conley v. Gibson*, 355 U.S. 41, 45-46 (1957); *Calderon v. Kansas Dep't of Social & Rehabilitation Servs.*, 181 F.3d 1180, 1183 (10th Cir. 1999). For purposes of making this determination, a court must accept the well-pleaded allegations of the complaint as true and construe them in the light most favorable to the plaintiff. *See Realmonte v. Reeves*, 169 F.3d 1280, 1283 (10th Cir. 1999). As granting a motion to dismiss is a harsh remedy, it must be cautiously

14

studied, both to effectuate the spirit of the liberal rules of pleading and to protect the interests of justice. *See Cottrell, Inc. v. Biotrol Int'l, Inc.*, 191 F.3d 1248, 1251 (10th Cir. 1999).

Discussion

Plaintiff filed suit on March 14, 2000, against various state officers, members of the judiciary, the Attorney General of the United States, and the State of Oklahoma. Plaintiff alleges that the State of Oklahoma conspired with others to file forgery charges against him and violated Federal criminal law prohibiting civil rights violations. As Plaintiff cannot sue based on this criminal statute, the Court interprets his *pro se* complaint as attempting to state a claim under 42 U.S.C. § 1983, which provides a civil action for the deprivation of rights. However, Plaintiff fails to state a claim under this statute, as well, because a state is not a "person" as that term is used in section 1983. *See Will v. Michigan Dep't of State Police*, 491 U.S. 58, 71 (1989); *Sutton v. Utah State Sch. for the Deaf & Blind*, 173 F.3d 1226, 1237 (10th Cir. 1999).

Plaintiff's Amended Complaint

Plaintiff filed an amended complaint on April 19, 2000. However, Plaintiff cannot amend his complaint without leave of the Court, because a defendant has filed an answer. *See* Fed. R. Civ. P. 15(a) ("A party may amend the party's pleading once as a matter of course at any time *before* a responsive pleading is served .... Otherwise a party may amend the party's pleading only by leave of court or by written consent of the adverse party; and leave shall be freely given when justice so requires." (emphasis added)). Therefore,

Plaintiff's amended complaint (or petition) will be disregarded by the Court and the parties.

Plaintiff's Apparent Refusal to Accept Mail

Plaintiff's continuing refusal to accept mail at the address provided on his pleadings is sanctionable conduct. The amended petition, filed April 19, 2000, is signed, "Rt. 2, Box 1481, Romana, Okla." This is the same address from which mail has been returned at least four times, bearing messages reading, "wrong address" or "RTS." Plaintiff has been warned that this behavior is unacceptable and sanctionable. Plaintiff is further warned that each additional instance of this sort of conduct does not relieve him of responsibility for the pleadings he is refusing to accept and merely increases the amount of sanctions for which he will be responsible.

IT IS THEREFORE ORDERED that the Motion to Dismiss on Behalf of the State of Oklahoma (# 7) is GRANTED and all claims against the State of Oklahoma are DISMISSED.

ORDERED this 25 day of APRIL, 2000.

TERRY C. KERN, CHIEF
UNITED STATES DISTRICT JUDGE

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OKLAHOMA

SPHERE DRAKE INSURANCE, P.L.C.,

Plaintiff,

v.

BICENTENNIAL, INC. d/b/a LADY GODIVA'S, et al.,

Defendant.

ENTERED ON DOCKET
DATE APR 26 2000

No. 97-CV-857-K

FILED
APR 25 2000
Phil Lombardi, Clerk
U.S. DISTRICT COURT

JUDGMENT

This matter came before the Court for consideration of Plaintiff's Motion for Summary Judgment. The issues having been duly considered and a decision having been rendered in accordance with the Order filed contemporaneously herewith,

IT IS THEREFORE ORDERED, ADJUDGED AND DECREED that judgment is hereby entered for Plaintiff Sphere Drake Insurance and against the Bicentennial, Inc., Daniel Patrick Harris, Chad Wayne Hillman, Travis Lee Shannon and Morgan D'Errico, individually and as estate representative. Plaintiff owes no duty to defend or indemnify in D'Errico v. Harris, 97-CV-274-K in the United States District Court for the Northern District of Oklahoma.

ORDERED this 25 day of April, 2000.

TERRY C. KERN, CHIEF
UNITED STATES DISTRICT JUDGE

51

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OKLAHOMA

SPHERE DRAKE INSURANCE, P.L.C.)
)
Plaintiff,)
)
vs.) No. 97-CV-857-K
)
BICENTENNIAL, INC., d/b/a)
LADY GODIVA'S, et al.,)
)
Defendants.)

ORDER

Before the Court are the cross-motions of the parties for summary judgment. Plaintiff insurance company brings this declaratory judgment action seeking a ruling that it has no duty to defend or indemnify in a wrongful death action in this Court.

In the early morning hours of September 24, 1996, Robert D'Errico was a patron at Lady Godiva's, a nightclub which offers nude entertainment. One of D'Errico's companions touched a dancer, and was asked to leave by a bouncer. D'Errico was then confronted by another bouncer, who asked D'Errico to also leave. D'Errico stated that he had just purchased a pitcher of beer, had done nothing to warrant ejection and wished to stay. A physical altercation then ensued. The altercation expanded to include more than one bouncer in addition to another customer. At the end of the struggle, nightclub employees realized D'Errico had no pulse and unsuccessfully administered CPR.

D'Errico's wife and estate filed an action in this Court

50

against Lady Godiva's and the bouncers, which has been assigned case no. 97-CV-274-K. The claims asserted are (1) wrongful death and (2) negligence by Lady Godiva's in its hiring and retention of employees. The civil litigation has been delayed while criminal charges against the bouncers were pursued. The present plaintiff is the insurer of Lady Godiva's. It argues that it was not required to defend or indemnify in the wrongful death action because (1) the policy contains an exclusion for claims arising out of assault and battery and (2) coverage is only provided for an "occurrence" which is defined in the policy as an accident.

Summary judgment is appropriate if "there is no genuine issue as to any material fact and . . . the moving party is entitled to a judgment as a matter of law." Fed.R.Civ.P. 56(c). The Court must view the evidence and draw any inferences in a light most favorable to the party opposing summary judgment, but that party must identify sufficient evidence which would require submission of the case to a jury. Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 249-52 (1986). Where the nonmoving party will bear the burden of proof at trial, that party must "go beyond the pleadings" and identify specific facts which demonstrate the existence of an issue to be tried by the jury. Mares v. ConAgra Poultry Co., Inc., 971 F.2d 492, 494 (10th Cir. 1992).

In researching the issues of this case, the Court has learned that incidents such as this have occurred numerous times and that many insurers of nightclubs have similar or identical policy exclusions. While an Oklahoma court has not addressed the issue,

the vast majority of those which have hold that physical contact employed by bouncers falls within the "assault and battery" exclusion. See e.g., Mattingly v. Sportsline, Inc., 720 So.2d 1227 (Ct.App.La.1998); Acceptance Ins. Co. v. Jedjo, Inc., 897 F.Supp. 978 (S.D.Tex.1995). The Court is persuaded this is the proper resolution under Oklahoma law as well.

Defendants argue that since the policy does not define the terms assault and battery, the Court should look to the definitions supplied in Oklahoma criminal law. The criminal statutes contain the elements of "willful" and "unlawful" use of force. Here, defendants argue, the bouncers had a lawful right to restrain D'Errico and used excessive force only in over-zealous self-defense when he resisted. Thus, defendants conclude, the use of force cannot be called "unlawful" and no assault and battery took place.

The Court disagrees. The tort of assault and battery need not be predicated on a criminal statute. Brown v. Ford, 905 P.2d 223, 229 (Okla.1995). In the civil context, these torts are generally defined as acting with the intent to cause a harmful or offensive touching. Id. at n.34. There is no doubt that the bouncers in this case at least intended to cause an offensive touching.

This conclusion dovetails into plaintiff's second argument that battery, an intentional tort, does not constitute an "occurrence" (i.e., an accident), under the policy. In Farmers Alliance Mut. Ins. Co. v. Salazar, 77 F.3d 1291 (10th Cir.1996), the court held that a drive-by shooting was not an "occurrence" (similarly defined) under a homeowners policy. Defendant seek to

distinguish Salazar by stating that in that case there was a clear intent to inflict death, while in the case at bar D'Errico's death was not expected or intended. This is not a viable distinction. The record supports the conclusion that there is no genuine issue of material fact that the bouncers intended to cause an offensive touching of D'Errico. This is sufficient to constitute assault and battery and fall within the policy exclusion.

Finally, the policy contains an exclusion for negligent acts or omissions in the "prevention or suppression of any act of Assault and/or Battery" and for negligence in the employment of a person for whom the insured is legally responsible which "results in Assault and/or Battery." Similar language has been held to preclude coverage for a "negligent hiring" claim. Britamco Underwriters, Inc. v. Stokes, 881 F.Supp. 196, 200-01 (E.D.Pa.1995). The Court concludes plaintiff has no duty to defend or indemnify against the underlying claims.

It is the Order of the Court that the motion of the defendant Morgan D'Errico for summary judgment (#21) is hereby DENIED. The motion of defendants Bicentennial, Inc., Travis Shannon and Chad Hillman for summary judgment (#26) is hereby DENIED. The motion of the plaintiff for summary judgment (#23) is hereby GRANTED.

ORDERED this 25 day of April, 2000.

TERRY C. KERN, Chief
UNITED STATES DISTRICT JUDGE

UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF OKLAHOMA

UNITED STATES OF AMERICA, Plaintiff, **v.** **REAL PROPERTY DESCRIBED AS FOLLOWS:** **ALL OF THAT PART OF LOT 3 OF THE SOUTHWEST QUARTER (SW/4) LYING NORTH OF THE FRISCO RAILROAD RIGHT OF WAY IN SECTION 9, TOWNSHIP 27 NORTH, RANGE 25 EAST OF THE INDIAN MERIDIAN, OTTAWA COUNTY, OKLAHOMA, LESS A TRACT DESCRIBED AS FOLLOWS:** **BEGINNING AT A POINT 653.0 FEET EAST OF THE NORTHWEST CORNER OF SAID LOT 3; THENCE S 0° 16' E 158.20 FEET; THENCE N 58° 47' E ALONG THE FRISCO RAILROAD RIGHT OF WAY 305.23 FEET; THENCE WEST 261.78 FEET TO THE POINT OF BEGINNING,** Defendants.	)	**CIVIL ACTION NO. 96-CV-652-K(J)**

JUDGMENT OF FORFEITURE

This cause having come before this Court upon the plaintiff's Motion for Judgment of Forfeiture by Default as to the defendant real property and all entities and/or persons interested in the defendant real property, the Court finds as follows:

The verified Complaint for Forfeiture *In Rem* was filed in this action on the 17th day

of July 1996, alleging that the defendant real property was subject to forfeiture pursuant to 18 U.S.C. § 1955, because it was property used in violation of 18 U.S.C. § 1955.

Warrant of Arrest and Notice *In Rem* was issued on the 23rd day of July 1996, by this Court to the United States Marshal for the Northern District of Oklahoma for the seizure and arrest of the defendant real property and for publication in the Northern District of Oklahoma.

Warrant of Arrest and Notice *In Rem* was issued on the 31st day of July 1996, by this Court to the United States Marshal for the Western District of Missouri for notice of the pending action and for publication in the Western District of Missouri.

The United States Marshals Service personally served a copy of the Complaint for Forfeiture *In Rem* and the Warrant of Arrest and Notice *In Rem* on the defendant real property on October 28, 1996. United States Marshals Service 285 forms reflecting service on potential claimants are on file herein.

Dorothy O'Brien, Michael O'Brien and the Ottawa County Treasurer were determined to be the only individuals with possible standing to file a claim to the defendant real property, and, therefore the only individuals to be served with process in this action.

All persons and/or entities interested in the defendant real property were required to file their claims herein within ten (10) days after service upon them of the Warrant of Arrest and Notice *In Rem*, publication of the Notice of Arrest and Seizure, or actual notice of this action, whichever occurred first, and were required to file their answer(s) to the Complaint within twenty (20) days after filing their respective claim(s).

No claims or answers have been filed of record in this action with the Clerk of the

Court, in respect to the defendant real property, and no persons or entities have plead or otherwise defended in this suit as to said defendant real property, save and except Dorothy Francis O'Brien, Michael O'Brien and the Ottawa County Treasurer, and the time for presenting claims and answers, or other pleadings, has expired; and, therefore, default exists as to the defendant real property and all persons and/or entities interested therein, save and except Dorothy Francis O'Brien, Michael O'Brien, and the Ottawa County Treasurer.

The United States Marshals Service for the Northern District of Oklahoma gave public notice of this action to all persons and entities by advertisement in the Tulsa Daily Commerce and Legal News, a newspaper of general circulation in the district in which this action is pending, on June 12, 19 and 26, 1997. Proof of Publication was filed July 14, 1997. Further, the United States Marshals Service for the Northern District of Oklahoma gave public notice of this action to all persons and entities by advertisement in the Miami News-Record, Miami, Ottawa County, Oklahoma, a newspaper of general circulation in the district where the real property is located, on April 4, 11 and 18, 1997. Proof of Publication was filed May 30, 1997.

The United States Marshals Service for the Western District of Missouri gave public notice of this action to all persons and entities by advertisement in the McDonald County News Gazette, Pineville, McDonald County, Missouri, a newspaper of general circulation in the district where the owners of the defendant real property resided, on April 23, 30 and May 7, 1997. Proof of Publication was filed May 30, 1997.

Dorothy Francis O'Brien filed her Claim herein on October 3, 1996, and her Answer

on October 16, 1996. The claim of Dorothy Francis O'Brien was stricken by the May 7, 1997, Order of the Court since Ms. O'Brien agreed that she no longer had an interest in the defendant real property.

The Ottawa County Treasurer filed its Answer on November 14, 1996. The Government has acknowledged the claim of the Ottawa County Treasurer, and stipulated to the payment of any unpaid ad valorem taxes on the defendant real property which are due and payable on or before the date of entry of a judgment of forfeiture from the net proceeds of the sale of the defendant real property after the payment to the United States of all expenses of forfeiture of the defendant real property, including, but not limited to expenses of seizure, custody, advertising, and sale.

Michael O'Brien filed his claim herein on March 19, 1998. By separate Order entered herein, the Court has granted the Government's Motion for Summary Judgment as to the claim of Michael O'Brien.

IT IS, THEREFORE, ORDERED, ADJUDGED, AND DECREED that the following-described defendant real property:

> All of that part of Lot 3 of the Southwest Quarter (SW/4) lying north of the Frisco Railroad Right of Way in Section 9, Township 27 North, Range 25 East of the Indian Meridian, Ottawa County, Oklahoma, LESS a tract described as follows:
>
> BEGINNING at a point 653.0 feet East of the Northwest Corner of said Lot 3; Thence S 0° 16' E 158.20 Feet; Thence N 58° 47' E along the Frisco Railroad Right of Way 305.23 Feet; Thence West 261.78 feet to the point of beginning.

be, and it hereby is, forfeited to the United States of America for disposition according to law.

IT IS FURTHER ORDERED by the Court that the proceeds of the sale of the above-described real property, its buildings, appurtenances, and improvements, shall be distributed in the following priority:

1) First, for the payment to the United States of all expenses of forfeiture of the defendant real property, including, but not limited to expenses of seizure, custody, advertising, and sale;

2) Second, for payment of all real estate taxes owed on the property to the date of the entry of this judgment of forfeiture, to the extent that the United States of America is responsible for said taxes;

3) Third, for payment to the United States of America of all amounts remaining after the above disbursements.

Entered this 24 day of April, 2000.

TERRY C. KERN
Chief Judge of the United States District Court
for the Northern District of Oklahoma

SUBMITTED BY:

CATHERINE J. DEPEW
Assistant United States Attorney

N:\udd\lpeaden\Forfeiture\o'brien\Judgment - Judgment of Forfeiture.wpd

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OKLAHOMA

KATY D. CHAMPAGNE and ANDRE CHAMPAGNE,	)	ENTERED ON DOCKET
	)	DATE APR 25 2000
Plaintiffs,	)	
v.	)	Case No. 98-CV-170-K (J)
SECURITY LIFE INSURANCE COMPANY OF AMERICA, INC.; CORPORATE BENEFIT SERVICES OF AMERICA, INC.; and WISCONSIN PHYSICIANS SERVICE INSURANCE CORPORATION,	)	FILED
	)	APR 24 2000
	)	Phil Lombardi, Clerk U.S. DISTRICT COURT
Defendants.	)	

ORDER

Before the Court is Defendant Corporate Benefit Services of America, Inc.'s ("CBSA's") motion for summary judgment.

History of Case

Plaintiffs are suing Defendants Wisconsin Physicians Service Insurance Corporation ("WPS"), CBSA, and Security Life Insurance Company of America, Inc. ("Security Life") for the events surrounding Plaintiff Katy Champagne's development of breast cancer, the initial denial and late payment of her claims, the amount of those payments, and the subsequent rise in both Plaintiffs' insurance premiums. Plaintiffs filed the Third Amended Complaint on November 18, 1999, alleging the following three causes of action against CBSA: (1) breach of the implied covenant of good faith and fair dealing; (2) intentional

143

infliction of emotional distress; and (3) misrepresentation and fraud. Plaintiffs also request punitive damages for the intentional and malicious nature of Defendants' actions and their reckless disregard for Plaintiffs' rights.

In late 1996, Plaintiffs applied for and received health insurance coverage with Security Life. This insurance was governed by the "Master Policy." Plaintiffs also received a "Comprehensive Major Medical Certificate" ("Certificate") as evidence of their insurance coverage. Although Security Life is Plaintiffs' insurer under the policy, it plays little role with the insureds. Rather Security Life has entered into a reinsurance agreement with WPS, under which WPS assumes responsibility for 100% of Security Life's risks under the policies at issue and Security Life receives a small percentage, around one percent, of collected premiums. Because WPS is incorporated as a not-for-profit entity under Wisconsin law, many states would not license it. WPS, therefore, opted to use reinsurance agreements such as the one with Security Life in order to fulfill its plan to expand into other states, like Oklahoma. In 1988, CBSA's predecessor had a block of business for which it had lost its insurers, and it and WPS approached Security Life about insuring this business through Security Life's reinsurance agreement with WPS.

CBSA is the third-party claims administrator for Security Life and administers its policies, in exchange for a share of the premiums. As administrator, CBSA reviews, underwrites, and evaluates policies; determines whether to accept or reject applications under the standards supplied to it; and determines effective dates and issues policies,

certificates of insurance, and other documentation. CBSA also bills premiums, decides whether to pay on claims, and responds to complaints. CBSA receives a percentage of net collected premiums, while bearing the costs of claims investigation and processing. CBSA pays its claims examiners on a per-claim rate, reduced to reflect their accuracy percentage. Therefore, a claims examiner who is not 100% accurate will not receive 100% compensation. The rate paid for claims is identical if they are paid or denied. However, CBSA does not pay for certain claims that are pended for investigation.

Security Life has assigned its CBSA administration contract to WPS. With regard to the policies at issue, WPS drafted the Master Policy, set new business and renewal premiums, and supervised and worked directly with CBSA regarding claims administration.

Plaintiffs' health insurance policy included three riders, excluding coverage for Katy Champagne's right shoulder, entire back and spine, and breast implants. In 1997, CBSA denied several claims made by Ms. Champagne on the basis of these riders or a preexisting condition. The rejected claims included treatment for a sprained hip, tennis elbow, a skin condition on her chin, and breast cancer.

Date of Treatment	Type of Claim	Amount of Claim	Date Rejected & Reason	Date Paid
Dec. 16, 1996	hip treatment	$207.15	June 2, 1997; Rider	Feb. 3, 1998;
Jan. 21, 1997	hip treatment	$82.00	June 2, 1997; Rider	Feb. 3, 1998;
Jan. 29, 1997	skin condition	$71.00	June 2, 1997; Pre-existing condition	Nov. 20, 1997;

Feb. 24 & 27, 1997	hip treatment	$90.75	May 19, 1997; Rider	June 11, 1997;
Mar. 4, 1997	hip treatment	$32.50	May 19, 1997; Rider	June 11, 1997;
Mar. 11, 1997	hip treatment	$47.75	May 19, 1997; Rider	June 11, 1997;
Mar. 14 & 18, 1997	hip treatment	$87.75	May 19, 1997; Rider	June 11, 1997;
Apr. 24 & 28, 1997	two mammograms	$207.00	June 2, 1997; Rider & Routine	July 17, 1997; July 6, 1999;[1]
May 6, 1997	breast cancer treatment	$106.00	June 4, 1997; Rider	July 17, 1997;
May 8, 1997	1st breast cancer surgery	$6001.75	June 18, 1997; Rider	July 22, 1997;
May 8, 1997	1st breast cancer surgery	$612.00	June 19, 1997; Rider	Aug. 18, 1997;
May 7 & 8, 1997	1st breast cancer surgery	$3431.96	June 16, 1997; Rider	July 17, 1997;
May 13, 1997	2nd breast cancer surgery	$193.00	n/a	July 6, 1999;
May 27, 1997	bone scan	$1246.50	June 30, 1997; Rider	Nov. 20, 1997;
Nov. 14, 1997	tennis elbow	$189.30	Dec. 22, 1997; Rider	Mar. 2, 1998

These denials subsequently were reversed – anywhere from one month to over two years following the denial. Some of the denials were not reversed until after Ms. Champagne filed her initial complaint in December 1997. CBSA also failed to pay on one claim, which it did

[1] At the time of their response to CBSA's motion for summary judgment, Plaintiffs asserted that this claim had not yet been fully paid.

not deny, for over two years. Most of the denials occurred in May and June of 1997, while Ms. Champagne was undergoing treatment for breast cancer, including two surgeries, chest x-rays, a bone scan, and a recommendation that she undergo radiation treatment.

The first-year, guaranteed premium for Plaintiffs' insurance was $382.29 per month. Effective January 1, 1998, Security Life offered to renew Plaintiffs' coverage at $1,014.34 per month. Plaintiffs accepted a lesser amount of coverage for a premium of $737.10. Effective July 1 of that year, the premium for Plaintiffs' new plan increased to $842.01 per month. Again Plaintiffs accepted a lesser amount of coverage, this time for a premium of $616.67. Effective November 1, the premium on Plaintiffs' latest plan increased to $1,005.73 per month. This time, Plaintiffs sought coverage from a different insurance company and let their policy with Defendants lapse.

CBSA asks the court to grant it judgment on the following claims: (1) breach of duty of good faith and fair dealing, because CBSA is not an insurer and has no duty and because CBSA is not part of a joint venture with Security Life and WPS; (2) intentional infliction of emotional distress, because the acts at issue are not sufficiently outrageous; and (3) tortious interference with contract, because, as Security Life's agent, CBSA cannot tortiously interfere with a contract between Security Life and Plaintiffs.[2]

---

[2]Plaintiffs eliminated this cause of action in their Third Amended Complaint, filed after CBSA's motion for summary judgment. Therefore, the Court need not address CBSA's arguments as to this claim. Moreover, by Order, filed April 11, 2000, the Court granted CBSA's motion to dismiss Plaintiffs' claim for misrepresentation and fraud added in the Third Amended Complaint. The Court found that Plaintiffs had failed to plead fraud with the particularity required by Fed. R. Civ. P. 9(b).

Summary Judgment Standard

Summary judgment is appropriate if "there is no genuine issue as to any material fact and . . . the moving party is entitled to a judgment as a matter of law." Fed. R. Civ. P. 56(c). The Court must view the evidence and draw any inferences in a light most favorable to the party opposing summary judgment, but that party must identify sufficient evidence which would require submission of the case to a jury. *See Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 249-52 (1986); *Mares v. ConAgra Poultry Co.*, 971 F.2d 492, 494 (10th Cir. 1992). Where the nonmoving party will bear the burden of proof at trial, that party must go beyond the pleadings and identify specific facts which demonstrate the existence of an issue to be tried by the jury. *See Mares*, 971 F.2d at 494. Additionally, although the non-moving party need not produce evidence at the summary judgment stage in a form that is admissible at trial, the content or substance of such evidence must be admissible. *See Thomas v. International Bus. Machs.*, 48 F.3d 478, 485 (10th Cir. 1995).

Breach of Implied Covenant of Good Faith & Fair Dealing

In Oklahoma, an insurer has a duty to act in good faith and deal fairly with its insured. *See Christian v. American Home Assurance Co.*, 577 P.2d 899, 904 (Okla. 1977). This duty extends to all types of insurance and includes, but is not limited to, the duty not to withhold unreasonably payment of claims. *See Buzzard v. Farmers Ins. Co.*, 824 P.2d 1105, 1108-09 (Okla. 1991).

Joint Venture

Plaintiffs argue that CBSA is liable for all the acts of WPS and Security Life, including breaching the duty of good faith and fair dealing, because it was a co-adventurer with the two companies. Plaintiffs argue that CBSA needed an insurer to cover its book of business and that WPS wanted to sell policies in states where it was not licensed. Security Life provided the link between the two parties by providing WPS with the license it needed, through the reinsurance agreement, and by entering an administration agreement with CBSA and assigning it to WPS.

A joint venture is an association of two or more persons to carry out a single business enterprise with the objective of realizing a profit. *See Martin v. Chapel, Wilkinson, Riggs, & Abney*, 637 P.2d 81, 85 (Okla. 1981). The essential criteria for determining the existence of a joint venture are as follows: (1) joint interest in property; (2) an express or implied agreement to share profits and losses of the venture; and (3) action or conduct showing cooperation in the venture. *See LeFlore v. Reflections of Tulsa, Inc.*, 708 P.2d 1068, 1072 (Okla. 1985). None of these elements alone is sufficient. *See Martin*, 637 P.2d at 85. While the contributions of the parties need not be equal or of the same character, each co-adventurer must contribute something promotive of the enterprise. *See id.* The essential test is the parties' intent. In order to establish liability to third parties, it is the legal and not actual intent that controls. That is, it is the intent to do those things which constitutes a joint venture that usually determines whether the relation exists. *See id.* at 86. CBSA disputes

whether Plaintiffs have established the second element of this test, the existence of an agreement to share profits and losses with WPS and Security Life.

There is no evidence indicating an agreement to share profits and losses. In applying the joint venture criteria to the facts at hand, no one fact is determinative and the Court must examine the situation as a whole. *See Martin*, 637 P.2d at 86. Profits in a joint venture must be joint and not several. *See Leflore*, 708 P.2d at 1072. The fact that each party received different consideration is irrelevant, as long as they are derived from a common source, the joint venture. *See id.* at 1073 (finding that an "I love you, Tulsa" party is a joint venture where the parties contributed directly to the party by contributing services free of charge and received profits directly therefrom, even if in different forms such as drink prices or publicity). An agreement to share in profits and losses exists when the parties share profits and are in a position to sustain actual loss by failure of the enterprise. *See Boren v. Scott*, 928 P.2d 327, 328 (Okla. Ct. App. 1996). Plaintiffs have not identified evidence indicating an agreement of this kind. The uncontroverted facts show that CBSA receives a percentage of collected premiums in exchange for performing claims administration under its agreement with Security Life, as assigned to WPS. There is no evidence of mutual sharing of losses. Rather, CBSA is paid a percentage of premiums to perform certain services and must bear the expenses of that performance. This is no more than is required of any person who is hired to perform a job. Furthermore, CBSA's risk of loss should the "enterprise" fail is irrelevant unless it also shares in profits. There is absolutely no evidence of any agreement

to share profits. Rather, CBSA receives a percentage of premiums, with no deduction for shared expenses. That CBSA derives this money from policies insured by Security Life is not enough to create a joint venture. This would be the case of *any* claims administrator whose pay was tied to the number of policies it administers. *Cf. Himes v. State Indus. Court*, 452 P.2d 570, 574 (Okla. 1969) (no joint venture where one party received income based on gross receipts without any mutual or reciprocal sharing of expenses or losses). Finally, while CBSA's contribution of the book of business and role in establishing this three-company relationship might indicate action or conduct showing cooperation in the venture, it in no way indicates an agreement to share profits and losses.

Special Relationship Between CBSA & Plaintiffs

A party other than the contractual insurer may owe the insureds a duty of good faith and fair dealing, if there is a special relationship between that party and the insured that could give rise to a duty of good faith. *See Wolf v. Prudential Ins. Co. of Am.*, 50 F.3d 793, 797 (10th Cir. 1995). In *Wolf*, the administrator assumed the ordinary insurer role of investigating and servicing claims. *See id.* While the insurer bore ultimate responsibility for benefit determination, the administrator made the determinations through at least two levels of appeal. *See id.* at 797-98. Moreover, the administrator received, as payment, a percentage of premiums, a percentage that increased as losses decreased. *See id.* at 798. The administrator also had a stop-loss agreement with the insurer, whereby the administrator was responsible for a share of the risk when losses reached a certain level and all of the risk when

losses exceeded an even higher level. *See id.* In these circumstances, the *Wolf* court found that the plan administrator could be subject to an insurer's duty of good faith and fair dealing. *See id.*

While CBSA shares many of the same administrative duties, it does not directly benefit from reduced losses in the same way as the administrator in *Wolf.* CBSA's receipt of premiums is not dependent on, nor in any way tied to, the insurer's losses. Moreover, CBSA has in no way promised to bear any risk related to the amount of losses. So, unlike the administrator in *Wolf*, CBSA does not have "the power, motive and opportunity to act unscrupulously." *Id.* Plaintiffs argue that if there are too many losses on the policies administered by CBSA, then the insurer will back out of the agreement, and CBSA will have no one to insure its book of business. This cause-and-effect scenario is too attenuated to support any inference that CBSA had such a motive to reduce losses through the denial of claims that it should be treated as if it were the insurer for purposes of the implied duty of good faith and fair dealing.

Intentional Infliction of Emotional Distress

Plaintiffs have presented sufficient evidence warranting a jury determination of their claim for intentional infliction of emotional distress. There are four elements of an intentional infliction of emotional distress claim in Oklahoma – (1) the defendant acted intentionally and recklessly; (2) the defendant's conduct was extreme and outrageous; (3) the plaintiff actually experienced emotional distress; and (4) this emotional distress was

severe. *See Taylor v. Pepsi-Cola Co.*, 196 F.3d 1106, 1111 (10th Cir. 1999). This claim is governed by the standards of the Restatement (Second) of Torts § 46. *See Starr v. Pearle Vision, Inc.*, 54 F.3d 1548, 1558 (10th Cir. 1995). Conduct is not extreme and outrageous unless it is beyond all possible bounds of decency in the setting in which it occurs or can be regarded as utterly intolerable in a civilized community. *See Gaylord Entertainment Co. v. Thompson*, 958 P.2d 128, 149 (Okla. 1998). Liability does not extend to mere insults, indignities, threats, annoyances, petty oppressions, or other trivialities. *See Miller v. Miller*, 956 P.2d 887, 901 (Okla. 1998). Rather, the conduct must have so totally and completely exceeded the bounds of acceptable social interaction that the law must provide redress. *See id.* The determination of what is extreme and outrageous takes into account the setting in which the conduct occurred. *See Starr,* 54 F.3d at 1558. Moreover, the extreme and outrageous character of the conduct may arise from the alleged tortfeasor's abuse of a position giving him actual or apparent authority over another person or the power to affect that person's interests. *See* Restatement (Second) of Torts § 46 cmt. e (1965) (citing, for example, police officers, school authorities, landlords, and collecting creditors). Furthermore, the extreme character may arise from the tortfeasor's knowledge that another is particularly susceptible to emotional distress due to a physical or mental condition. *See id.* cmt. f. This tort does not, however, provide relief when the alleged tortfeasor has done no more than insist upon his legal rights in a permissible way. *See id.* cmt. g.

In a claim for intentional infliction of emotional distress, it is the Court's

responsibility to determine whether Defendant's conduct "may reasonably be regarded as sufficiently extreme and outrageous to meet the § 46 standards." *Eddy v. Brown*, 715 P.2d 74, 76 (Okla. 1986). The Court will not submit this claim to the jury unless reasonable people could find the conduct sufficiently extreme and outrageous. *See id.* at 76-77.

Plaintiffs have identified sufficient facts from which a reasonable person could find that CBSA's conduct was extreme and outrageous. CBSA, as the claims administrator of Plaintiffs' health insurer, had the power to affect Plaintiffs' interests in a dramatic way, by approving or denying their claims in the first instance. Against this backdrop and with the evidence presented, a jury could find, among other things, that CBSA adopted practices that deliberately discouraged claims investigation and denied claims without basis or investigation. Moreover, a jury could find that CBSA knew of Ms. Champagne's increased susceptibility to emotional distress due to her diagnosis with breast cancer and likely need for future treatments and that it failed to respond to her repeated inquiries regarding her coverage, even when told that some of her bills were being sent to collection. In these circumstances, a reasonable person could find that CBSA's conduct was sufficiently extreme and outrageous to support a claim for intentional infliction of emotional distress.

Conclusion

CBSA does not owe a duty of good faith and fair dealing to Plaintiffs, because it is not their insurer, does not act as an insurer so as to have a special relationship with Plaintiffs from which this duty could arise, and is not in a co-adventurer with WPS and Security Life.

However, a jury could find CBSA's conduct sufficiently extreme and outrageous to support Plaintiffs' claim for intentional infliction of emotional distress.

IT IS THEREFORE ORDERED that the Defendant's Corporate Benefit Services of America, Motion for Summary Judgment (# 71) is GRANTED as to Plaintiffs' claim for breach of the implied covenant of good faith and fair dealing and DENIED as to Plaintiffs' claim for intentional infliction of emotional distress.

ORDERED this 24 day of APRIL, 2000.

TERRY C. KERN, CHIEF
UNITED STATES DISTRICT JUDGE

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OKLAHOMA

MELVIN EASILEY, et al.,

Plaintiffs,

v.

NORRIS, a Dover Resources Company,

Defendant.

Case No. 99-CV-196-K (J)

FILED
APR 24 2000
Phil Lombardi, Clerk
U.S. DISTRICT COURT

ORDER

Before the Court is plaintiff's motion to dismiss with prejudice. In this matter, plaintiffs allege a First Amendment violation against defendant for allegedly interfering with plaintiff Easiley's attempt to talk with other plaintiffs (defendant's employees) about possible Title VII violations. At the commencement of the action, plaintiffs sought a temporary restraining order against defendant which this Court denied. Plaintiffs appealed that order, and the Tenth Circuit Court of Appeals has not yet rendered a decision.

The litigation has proceeded in this Court and has been acrimonious to say the least. Magistrate Judge Joyner has assessed discovery sanctions against plaintiffs' counsel. Another motion for Rule 11 sanctions against plaintiffs' counsel has been referred to the Magistrate Judge. Plaintiffs had earlier filed a motion to dismiss without prejudice, which had also been referred to the Magistrate Judge. Defendant responded in opposition, seeking attorney fees and costs as a condition. Magistrate Judge Joyner held a hearing and apparently indicated to plaintiffs' counsel that the Magistrate Judge was not inclined to permit a dismissal without prejudice, unless some sort of condition (perhaps including a fee assessment) was attached. Plaintiff has now filed the present

motion, seeking dismissal with prejudice.

The present motion was filed April 21, 2000, but defendant (apparently receiving an advance copy) responded to the motion in its filing of April 20, 2000. The Court therefore proceeds to consider the motion. Defendant correctly notes that in Aerotech, Inc. v. Estes, 110 F.3d 1523 (10th Cir.1997), the court held that under Rule 41 F.R.Cv.P. "a defendant may not recover attorneys' fees when a plaintiff dismisses an action with prejudice absent exceptional circumstances." Id. at 1528 (footnote omitted). Defendant is further correct that the Tenth Circuit has never defined what qualifies as "exceptional circumstances", but argues that the failure of plaintiffs' counsel to conduct himself properly in the discovery process should be so considered. The Court disagrees. Unfortunately, discovery abuse (if it has taken place in this litigation) is not uncommon. Courts have the power to sanction such conduct, as Magistrate Judge Joyner has already done in this case, and may do again regarding the pending motion.

Granting fees regarding a dismissal with prejudice should be the exception because the rationale for awarding fees in connection with a dismissal without prejudice is to compensate defendant for litigation which it may face again. When the dismissal is with prejudice, defendant does not bear the risk of facing the litigation again. Awarding fees in such an instance violates the "American rule" that each side normally bears its own fees. As the Tenth Circuit has said, there may be exceptional circumstances in which such fee-shifting is appropriate, but the Court is not persuaded this is such a case.

It is the Order of the Court that the motion of plaintiffs (#145) to dismiss with prejudice is hereby GRANTED. This action is dismissed with prejudice but without other terms and conditions under Rule 41(a)(2) F.R.Cv.P. All pending motions are declared moot with the exception of defendant's motion for sanctions (#114).

ORDERED this 24 day of April, 1999.

TERRY C. KERN, Chief
United States District Judge

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OKLAHOMA

DEE JAY BERRY,

Plaintiff,

vs.

NATIONAL COOPERATIVE REFINERY ASSOCIATION,

Defendant.

No. 99-CV-37-K

FILED
APR 24 2000
Phil Lombardi, Clerk
U.S. DISTRICT COURT

JUDGMENT

This action came on for jury trial, the Honorable Terry C. Kern, Chief District Judge, presiding. The jury returned a verdict assessing damages in the amount of $1,680,000.00, and assessing plaintiff's contributory negligence at 1%, defendant's negligence at 1% and the negligence of non-party Enquip, Inc. at 98%. Pursuant to Bode v. Clark Equip. Co. 719 P.2d 824 (Okla.1986), defendant is liable to plaintiff to the extent of its negligence.

IT IS THEREFORE ORDERED that the Plaintiff Dee Jay Berry recover of the Defendant National Cooperative Refinery Association the sum of $16,800.00, with interest thereon at the rate provided by law.

ORDERED this 24 day of April, 2000.

Terry C Kern

TERRY C. KERN, CHIEF
UNITED STATES DISTRICT JUDGE

IN THE UNITED STATES COURT
FOR THE NORTHERN DISTRICT OF OKLAHOMA

ARMANDO MANQUAL-VELEZ,

Plaintiff,

v.

KENNETH APFEL,
Commissioner, SSA,

Defendant.

Civil Action No. 99-604-M

ORDER

Before the Court is the parties' Agreed Motion To Reverse and Remand to the Commissioner for further administrative proceedings before an Administrative Law Judge. Upon examination of the merits of this case, it is hereby ORDERED that this Motion be granted and this case be reversed and remanded to the Commissioner for further administrative action pursuant to sentence 4 of section 205(g) of the Social Security Act, 42 U.S.C. § 405(g).

THUS DONE AND SIGNED on this 24th day of April 2000.

Frank H. McCarthy
FRANK H. McCARTHY
United States Magistrate Judge

IN THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF OKLAHOMA

ARMANDO MANQUAL-VELEZ, Plaintiff,	)	
v.	)	CASE NO. 99-CV-604-M
KENNETH S. APFEL, Commissioner of the Social Security Administration,	)	
Defendant.	)	

JUDGMENT

Judgment is hereby entered for Plaintiff and against Defendant. Dated this 24th day of April, 2000.

Frank H. McCarthy
FRANK H. McCARTHY
UNITED STATES MAGISTRATE JUDGE

IN THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF OKLAHOMA

MARY A. WALTON,

Plaintiff,

v.

KENNETH S. APFEL,
Commissioner of the Social Security Administration,

Defendant.

CASE NO. 99-CV-601-M

JUDGMENT

Judgment is hereby entered for Plaintiff and against Defendant. Dated this 24th day of APRIL, 2000.

Frank H. McCarthy
FRANK H. McCARTHY
UNITED STATES MAGISTRATE JUDGE

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OKLAHOMA

MARY A. WALTON,

Plaintiff,

v.

KENNETH S. APFEL, COMMISSIONER OF SOCIAL SECURITY ADMINISTRATION,

Defendant.

CIVIL ACTION NO. 99-CV-601-M

ORDER

IT IS ORDERED, ADJUDGED AND DECREED that this case be, and it is hereby remanded to the Defendant for further administrative action pursuant to sentence four (4) of § 205(g) of the Social Security Act, 42 U.S.C. § 405(g). *Melkonyan v. Sullivan*, 501 U.S. 89 (1991).

Upon remand, the Commissioner will provide the claimant an opportunity to update the medical record. The ALJ will reevaluate the claimant's residual functional capacity and will cite evidence which supports his conclusions as to the claimant's residual functional capacity. The ALJ will determine whether the claimant can return to her past relevant work and, if not, will obtain the testimony of a vocational expert as to the jobs, if any, that the claimant can

perform considering her age, education, past relevant work, and exertional and nonexertional limitations.

Frank H. McCarthy 4-24-00
FRANK H. McCARTHY
United States Magistrate Judge

UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF OKLAHOMA

MARILYN G. DAY,
SSN: 458-17-7474,

Plaintiff,

v.

KENNETH S. APFEL, Commissioner, Social Security Administration,

Defendant.

Case No. 99-CV-0435-EA

JUDGMENT

This action has come before the Court for consideration and an Order remanding the case to the Commissioner has been entered. Judgment for the Plaintiff and against the Defendant is hereby entered pursuant to the Court's Order.

It is so ORDERED this 24th day of April, 2000.

Claire V Eagan

CLAIRE V. EAGAN
UNITED STATES MAGISTRATE JUDGE

19

UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF OKLAHOMA

MARILYNN G. DAY,

Plaintiff,

v.

KENNETH S. APFEL, Commissioner of the Social Security Administration,

Defendant.

Case No. 99-CV-435-EA

ORDER

Upon the motion of the defendant, Commissioner of the Social Security Administration, by Stephen C. Lewis, United States Attorney of the Northern District of Oklahoma, through Peter Bernhardt, Assistant United States Attorney, and for good cause shown, it is hereby ORDERED that this case be remanded to the Commissioner for further administrative action pursuant to sentence 4 of section 205(g) of the Social Security Act, 42 U.S.C. 405(g).

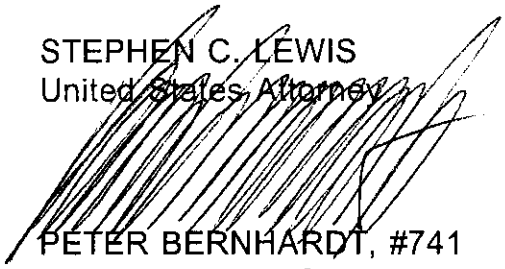
DATED this 21st day of April, 2000.

Claire V Eagan

CLAIRE V. EAGAN
United States Magistrate Judge

18

SUBMITTED BY:



STEPHEN C. LEWIS
United States Attorney

PETER BERNHARDT, #741
Assistant United States Attorney
333 West 4th Street, Suite 3460
Tulsa, Oklahoma 74103-3880
(918) 581-7463

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OKLAHOMA

KEITH RUSSELL JUDD
FOR PRESIDENT OF USA,

Plaintiff,

vs.

UNITED STATES OF AMERICA,
et al.,

Defendant.

ENTERED ON DOCKET
DATE APR 21 2000

Case No. 00-CV-220-K (M)

FILED
APR 20 2000
Phil Lombardi, Clerk
U.S. DISTRICT COURT

ORDER

By Order entered March 15, 2000 (Docket #2), Plaintiff, a prisoner incarcerated at the Federal Correctional Institution located in Big Spring, Texas, and appearing *pro se*, was directed to either pay the full $150.00 filing fee required to commence this action or to submit a properly supported motion for leave to proceed *in forma pauperis*. Plaintiff was specifically instructed that pursuant to 28 U.S.C. § 1915(a)(2), a "prisoner seeking to bring a civil action . . . without prepayment of fees . . . in addition to filing the affidavit filed under paragraph (1), shall submit a certified copy of the trust fund account statement (or institutional equivalent) for the prisoner for the 6-month period immediately preceding the filing of the complaint . . . obtained from the appropriate official of each prison at which the prisoner is or was confined." Plaintiff was advised that the accounting information was necessary so that the Court could assess not only Plaintiff's ability to pay the filing fee but also his ability to pay an initial partial filing fee to be applied towards the filing fee should Plaintiff be allowed to proceed without prepayment of the full fee. See 28 U.S.C. § 1915(b). Plaintiff was further reminded that even if he has insufficient funds to prepay the

5

full $150.00 filing fee required to commence this action, he will nonetheless be responsible for full payment of the filing fee as mandated by 28 U.S.C. § 1915(b). Lastly, Plaintiff was advised that "[f]ailure to comply with this order may result in the dismissal of this action without prejudice." (#2).

Plaintiff was directed to pay the full $150 filing fee or to submit a motion for leave to proceed *in forma pauperis*, including the required accounting information, or to show cause in writing for his failure to do so, on or before April 15, 2000. The Court Clerk sent Plaintiff a blank copy of the court-approved form for a motion for leave to proceed *in forma pauperis*.

On March 24, 2000, the Court received for filing a motion for leave to proceed *in forma pauperis* (#3) from Plaintiff. However, Plaintiff failed to comply with the clear directive of the Court requiring submission of the accounting information as mandated by 28 U.S.C. § 1915(a)(2). No accounting information was provided by Plaintiff. Furthermore, the court-approved form used by Plaintiff had been altered by the removal of that part of the form requiring certification by a prison official and attachment of the prison accounting (form ifp-cr.dis at pages 3 and 4) prior to submission to the Court.

The deadline for complying with the March 15, 2000, Order has now passed. Plaintiff has not complied with the Court's Order nor has he shown cause in writing for his failure to do so. For those reasons, the Court finds Plaintiff's motion for leave to proceed *in forma pauperis* should be denied and this action should be dismissed without prejudice for failure to comply with this Court's Order of March 15, 2000. Fed. R. Civ. P. 41(b).

ACCORDINGLY, IT IS HEREBY ORDERED that:

1. Plaintiff's motion for leave to proceed *in forma pauperis* (#3) is **denied** for non-compliance.

2. This action is **dismissed without prejudice** for failure to comply with the Court's Order of March 15, 2000.

3. This Order constitutes a final order in this case.

SO ORDERED THIS 20 day of April, 2000.

TERRY C. KERN, Chief ~~Judge~~
UNITED STATES DISTRICT COURT